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## Unsteady on Its Feet: Sobriety Checkpoint Reasonableness

Michael F. Lotito

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# Unsteady on Its Feet: Sobriety Checkpoint Reasonableness

Michael F. Lotito\*

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\* Candidate for J.D., Washington and Lee University School of Law, May 2010; B.S.B.A., University of North Carolina at Chapel Hill, 2005. I thank those who made this Note possible: the Suffolk County District Attorney's Office of New York for inspiring this topic; Professor Russell A. Miller for helping me develop the idea and for serving as my advisor; Peter S. Massaro for his advice and dedicated assistance to this project; Michael T. McCarthy and Bridget Tainer-Parkins for their careful review; and, of course, my family—especially my parents, Frank and Kathleen—for their support, love, and endless entertainment.

### I. Introduction

"Drunk driving will never be eliminated in a society recognizable as our own."<sup>1</sup> These are sobering words, especially when recent government data suggests that drunk driving kills up to one American every forty minutes, totaling nearly 13,000 fatalities in 2007.<sup>2</sup> The faces of the needless dead remind us that the criminalization of drunk driving is deeply personal.<sup>3</sup> Motivated by those most intimately affected by drunk driving,<sup>4</sup> and with the ultimate, albeit unrealistic, goal of completely eliminating drunk drivers from our highways, the federal government has supported, and the states have implemented, various enforcement programs aimed at apprehending and, more importantly, deterring motorists from driving under the influence of alcohol.<sup>5</sup> But when an enforcement program necessarily trades Fourth Amendment liberties for public safety, the courts are left to answer the difficult question: Is it worth it? Even the most noble enforcement programs must withstand

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1. H. LAURENCE ROSS, *CONFRONTING DRUNK DRIVING* 193 (1992).

2. See *60 Minutes: DWI Deaths: Is it Murder?* (CBS television broadcast Jan. 4, 2009), available at <http://www.cbsnews.com/stories/2008/12/31/60minutes/main4694666.shtml> ("Drunk driving kills more than 13,000 Americans a year—that's one every 39 minutes.") (transcript on file with the Washington and Lee Law Review); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUBL'N NO. DOT HS 810 965, at 1 (2008), available at <http://www-nrd.nhtsa.dot.gov/Pubs/810985.PDF> (providing that "[i]n 2007, 12,998 people were killed in alcohol-impaired-driving crashes," which "represent[s] an average of one alcohol-impaired-driving fatality every 40 minutes"). The National Highway Traffic Safety Administration (NHTSA) defines "alcohol-impaired-driving fatalities" as "fatalities that occur in motor vehicle traffic crashes that involve at least one driver or a motorcycle rider (operator) with a blood alcohol concentration (BAC) of .08 grams per deciliter or above." *Id.* at 7. Note, however, that "[t]he term 'alcohol-impaired' does not indicate that a crash or a fatality was caused by alcohol impairment." *Id.* at 1.

3. See, e.g., *60 Minutes*, *supra* note 2 (reporting on the murder conviction of Martin Heidgen, who drove for miles—the wrong way—down a parkway with "a blood alcohol content over three times the legal limit" and crashed into an oncoming vehicle, killing the driver and beheading a seven-year-old girl); GERALD D. ROBIN, *WAGING THE BATTLE AGAINST DRUNK DRIVING 9–10* (1991) (stating why Candy Lightner launched Mothers Against Drunk Driving (MADD)—her thirteen-year-old daughter was the fatal victim of a hit-and-run drunk driver).

4. See, e.g., ROBIN, *supra* note 3, at 10 ("MADD ha[s] become the driving force behind the movement to reform drunk driving laws, to encourage societal intolerance of drunk drivers, and to alter the benign attitudes of prosecutors and judges toward the offense and the offenders.").

5. See, e.g., Jack Stuster, *Creating Impaired Driving General Deterrence: Eight Case Studies of Sustained, High-Visibility, Impaired-Driving Enforcement*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUBL'N NO. DOT HS 809 950, at 1 (2006) (presenting a comprehensive report on "eight case studies of programmatic efforts that are intended to reduce the incidence of impaired driving").

constitutional scrutiny. This Note focuses on one program that is no stranger to the legal and social discourse: the sobriety checkpoint.<sup>6</sup>

Sobriety checkpoints are unique among the various anti-drinking and driving enforcement procedures mainly because police officers may conduct sobriety checkpoint stops, unlike most other vehicle stops, without individualized suspicion.<sup>7</sup> Contrast, for example, the traditional roving patrol stop.<sup>8</sup> A roving patrol officer has authority to stop a motorist when the officer observes articulable facts and objective indicia of impairment.<sup>9</sup> Roving patrol officers observe drivers for signs of alcohol impairment—whether on the faces of oncoming drivers or as exhibited by erratic driving behavior.<sup>10</sup> Dr. Jack Stuster, in a report for the Transportation Research Board, analogized sobriety checkpoint stops and roving patrol stops with fishing strategies:

[L]obster fishermen, crab trappers, and most gillnetters deploy their gear in locations known to be inhabited by the target species, in much the same way that checkpoints are set up at locations known for DWI [driving while intoxicated] arrests or alcohol-involved crashes. In contrast, some fishermen adopt a hunting strategy by searching for indicators of fish by both visual and technical means, then pursuing their prey, in the same

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6. This Note refers to sobriety checkpoints generally throughout. Still, the reader should understand that the specific sobriety checkpoint at issue is comparable to the sobriety checkpoint at issue in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). See also *Traffic Safety Facts*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUBL'N NO. DOT HS 810 881W, at 1 (2008) ("NHTSA defines a sobriety checkpoint as the stopping of vehicles, or a specific sequence of vehicles (i.e., every fifth vehicle), at a predetermined fixed location to detect drivers who are impaired by alcohol or other drugs.").

7. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 458 (1990) (Brennan, J., dissenting) (describing the sobriety checkpoint as "a program that subjects the general public to suspicionless seizures").

8. See Jack W. Stuster, *Increasing the Opportunities to Examine Impaired Drivers*, in TRANSP. RES. Stuster No. E-C020, at D-1, D-3 (2000), available at <http://onlinepubs.trb.org/onlinepubs/circulars/ec020.pdf> ("Most special DWI [Driving While Intoxicated] enforcement consists of roving patrols . . . in which officers concentrate their efforts on detecting and processing DWI motorists.").

9. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) ("[O]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that . . . [criminal activity is afoot]."); see also *Whren v. United States*, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.").

10. See Stuster, *supra* note 8, at D-3 ("Experienced officers usually inspect the faces of oncoming drivers for the signs of alcohol impairment, in addition to evaluating driving performance from behind.").

manner that roving patrol officers search for, then stop, motorists who exhibit DWI cues.<sup>11</sup>

To expand the analogy further, these fishers aim to deplete entirely a certain fish stock from their waters—namely, drunk fish. Unlike a trap, however, the sobriety checkpoint operates to scare drunk fish out of the water.<sup>12</sup> In other words, a successful sobriety checkpoint, although designed like a trap to catch drunk fish, will eventually catch no drunk fish at all because the trap scared all the drunk fish away.<sup>13</sup> The fishers get skunked in a good way when there are no more drunk fish in the sea. When the trap neither catches nor scares the drunk fish away, however, the fishers are just plain getting skunked.

Unlike fish, motorists have Fourth Amendment protections—whether drunk or not. The Supreme Court, therefore, reviewed a Fourth Amendment challenge to suspicionless sobriety checkpoint stops in *Michigan Department of State Police v. Sitz*.<sup>14</sup> In *Sitz*, the Court reviewed the *reasonableness* of "the initial [suspicionless] stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers."<sup>15</sup> *Sitz*, therefore, is a battle won for reasonableness advocates in the broader reasonableness versus warrant preference war over Fourth Amendment interpretation.<sup>16</sup> With reasonableness alone at issue, the Court set out to balance the competing interests and a majority sided with the government.<sup>17</sup>

But the reasonableness standard is a nebulous standard, open to varied interpretation. This Note proposes a more accurate examination of sobriety checkpoint reasonableness. This Note argues that *Sitz* granted too much blind deference to "politically accountable officials,"<sup>18</sup> and, with almost nineteen years of post-*Sitz* hindsight, attempts to provide a better understanding of sobriety checkpoint reasonableness by using empirical research and fundamental economic principles. In doing so, this Note predicts a point in time when sobriety checkpoints are unreasonable under any reasonableness

11. *Id.* at D-12 to -13.

12. *See infra* Part III.B (articulating the sobriety checkpoint's role as a deterrent).

13. *See* Stuster, *supra* note 8, at D-13 ("[A] declining arrest rate is a measure of a checkpoint program's deterrence on drivers.").

14. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990) (holding that temporary roadside sobriety checkpoints are not per se unconstitutional).

15. *Id.* at 450–51.

16. *See infra* Parts II.A–B (articulating the warrant preference and reasonableness approaches to Fourth Amendment interpretation).

17. *See* Sitz, 496 U.S. at 450 (citing the balancing test from *Brown v. Texas*, 443 U.S. 47 (1979), as the applicable standard of review).

18. *Id.* at 453.

standard—when sobriety checkpoints are *irrational*.<sup>19</sup> Lastly, this Note offers a response to recent scholarship taking a normative position on how the Supreme Court should act to enhance and legitimize, rather than merely allow, use of sobriety checkpoints.<sup>20</sup>

Part II briefs four viewpoints on reasonableness: the warrant preference approach, the reasonableness approach, the *Sitz* approach, and the economic approach. Part III applies the economic approach to sobriety checkpoints using empirical studies and provides a general model to illustrate sobriety checkpoint utility, and therefore reasonableness, over time. Part IV offers a response to recent scholarship. Lastly, Part V provides a brief conclusion.

## II. Rational Viewpoints on Unreasonable Seizures

Before modeling the reasonableness of sobriety checkpoints, a basic understanding of the various perspectives concerning the protections of the Fourth Amendment is appropriate, even if "orthodox Fourth Amendment jurisprudence is a theoretical mess, full of doctrinal incoherence and inconsistency."<sup>21</sup> The Fourth Amendment to the United States Constitution has a Reasonableness Clause<sup>22</sup> and a Warrant Clause,<sup>23</sup> the principal scholarly split of opinion turns on whether the latter informs the former or whether the two clauses stand alone.<sup>24</sup> Parts II.A and II.B briefly outline the conflicting

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19. See *infra* Part III.D (illustrating the irrational point).

20. See Shan Patel, Note, *Per Se Reasonable Suspicion: Police Authority to Stop Those Who Flee from Road Checkpoints*, 56 DUKE L.J. 1621, 1621 (2007) (arguing "that the Supreme Court should adopt a bright-line rule that allows police to stop vehicles that attempt to evade checkpoints").

21. Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. CIV. RTS. L.J. 261, 261 (2005).

22. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

23. See *id.* ("[N]o Warrants shall issue, but upon probable cause . . .").

24. See, e.g., Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 7 (2007) ("In contention is whether the constitutional touchstone is the Reasonableness Clause or the Warrant Clause and, if the latter, under what circumstances it is legitimate to turn to the Reasonableness Clause to justify a search."); Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 529 (1997) ("A small forest has been pulped by legal scholars debating whether the two clauses of the Fourth Amendment stand alone, or whether the second Warrant Clause modifies the first Reasonableness Clause by defining a reasonable search."). Professor Rickless explains that, if the Warrant Clause informs the Reasonableness Clause, then the Fourth Amendment "consists in the application of formal rules deduced from *a priori*

viewpoints. Part II.C contrasts the majority and dissenting opinions of *Sitz*. Part II.D introduces law and economics to sobriety checkpoint reasonableness.

### A. The Warrant Preference Rule

The traditional warrant preference rule assumes that, because the Warrant Clause qualifies the Reasonableness Clause, searches and seizures are presumed unreasonable unless supported by a warrant upon a finding of probable cause.<sup>25</sup> The Court has accepted this view but also has recognized various exceptions to the general rule.<sup>26</sup> One category of exceptions is the "special needs" exception, which extends to stops conducted pursuant to sobriety checkpoints.<sup>27</sup> As the Court continues to find additional special needs,

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foundational principles." Rickless, *supra* note 21, at 279. If the Reasonableness Clause stands alone, then the Amendment "favor[s] . . . a pragmatic methodology designed to achieve socially optimal results on the basis of a 'balancing' of competing interests." *Id.*

25. See Buffalo, *supra* note 24, at 529 ("If the second clause modifies the first, then only searches supported by a warrant and probable cause are reasonable."). But see Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 954 (2003) (criticizing the assumption "that warrantless searches are presumptively [unreasonable and thereby] unconstitutional"). Professor Amar identifies this line of thought as "a strict (per se) variant" of the warrant requirement argument, which "presumes that warrantless searches and seizures are per se unreasonable." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762 (1994).

26. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); see also *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring) (acknowledging that the warrant requirement controls Fourth Amendment jurisprudence but describing it as "illusory" and "unrecognizable" because numerous exceptions diminish the requirement); Rickless, *supra* note 21, at 280 ("[T]he Court has found a number of exceptions, all but one of which it has classified under five main headings of its own devising: Exigent Circumstances, Special Needs, Diminished Interests, Consent, and History."). Professor Amar identifies this as "a looser (modified) variant that concedes the need to craft various common-sense exceptions to a strict warrant rule." Amar, *supra* note 25, at 762.

27. See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) ("[W]here a Fourth Amendment intrusion serves *special governmental needs*, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." (emphasis added)).

Significantly, the respondent in *Sitz* argued that, to trigger the special needs rule, the government must "show[] . . . some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990). After quoting the *Von Raab* passage, the Court, however, ruled that the *Von Raab* decision "in no way . . . repudiate[d] our prior cases dealing with police stops of motorists on public highways." *Id.* at 450. Other legal precedent controlled

broadening the scope of exceptions to the general rule, warrant preference advocates increasingly voice their dissatisfaction.<sup>28</sup> Under the warrant preference rule, the special needs doctrine is at best a justification for the infringement of Fourth Amendment rights.<sup>29</sup>

### B. The Reasonableness Approach

Those who presume that the Reasonableness Clause rests on its own bottom argue that reasonableness, and reasonableness alone, is the dispositive inquiry.<sup>30</sup> They believe that the warrant preference rule is unworkable, evidenced by the numerous exceptions to the rule,<sup>31</sup> they look for support from the history surrounding the ratification of the Fourth Amendment;<sup>32</sup> and they

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the inquiry, and the issue, therefore, simply was whether the sobriety checkpoint stops were "reasonable" pursuant to the Fourth Amendment. *Id.* at 450.

Many scholars agree that sobriety checkpoint stops are scrutinized under the special needs exception. *See, e.g.,* Lerner, *supra* note 25, at 1003–04 (noting that "DUI checkpoints and airport magnetometer searches are perhaps the classic examples of . . . special needs searches"); Rickless, *supra* note 21, at 283 (positing that the Court has classified cases involving sobriety checkpoints "under the rubric of Special Needs").

28. *See, e.g.,* Lerner, *supra* note 25, at 955 n.19 (citing scholarly articles that voice criticism over the continuous decline of the warrant requirement); John C. Sheldon, *Sobriety Checkpoints, the Rational-Basis Test, and the Law Court*, 8 ME. BAR J. 80, 80 (1993) (intimating that the Court's decision in *Sitz* is an example of how "the Supreme Court continues to shrink Fourth Amendment protections"); Buffalo, *supra* note 24, at 530–31 ("Th[e] [special needs] exception is so broad and far-reaching that it is poised to turn the warrant preference rule on its head.").

29. *See* Rickless, *supra* note 21, at 283 ("[I]t remains unclear why a need's being 'special' (in the relevant sense) justifies the infringement of Fourth Amendment rights.").

30. *See, e.g.,* *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.' What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use."); Amar, *supra* note 25, at 801 ("The core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness."). Importantly, however, Professor Amar defines Fourth Amendment reasonableness as a matter of common-sense (tort) reasonableness and constitutional reasonableness. *See* Amar, *supra* note 25, at 801–11 (discussing common-sense (tort) reasonableness and constitutional reasonableness to explore what "makes for a substantively unreasonable search or seizure" under the Fourth Amendment).

31. *See, e.g.,* Lerner, *supra* note 25, at 955 ("Although the Supreme Court has not tired of repeating [that warrantless searches and seizures are presumptively unconstitutional] . . . , the 'warrant requirement[]' . . . is so riddled with exceptions . . . that the presumption in practice works in exactly the opposite direction."). *But see* Rickless, *supra* note 21, at 279–80 ("[T]here is nothing inherently problematic about the existence of a large number of exceptions to a given principle . . . unless the exceptions to it are vaguely defined and poorly delineated.").

32. *See, e.g.,* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 43



look for support from the literal text of the Fourth Amendment.<sup>33</sup> When reasonableness alone is the dispositive inquiry, they argue, searches and seizures do not require a minimum standard of probable cause,<sup>34</sup> rather, the reasonableness inquiry entails a careful balancing of government interest in conducting the search or seizure against the social cost of allowing the government to conduct the search or seizure.<sup>35</sup> To them, the "special needs" exception under a warrant preference rule is a roundabout way to reach the appropriate judicial inquiry: Reasonableness.

### C. Michigan Department of State Police v. Sitz

Early in 1986, nineteen officers of the Michigan Department of State Police conducted a sobriety checkpoint, resulting in 126 stops and two arrests.<sup>36</sup> Respondents, as licensed drivers in the State of Michigan, sought declaratory and injunctive relief the day before the operation of the checkpoint.<sup>37</sup> After the case worked its way through the lower courts, the Michigan Court of Appeals

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(1969) (positing that the Framers "did not prohibit as unreasonable all searches not covered by warrants issued in compliance with the second [Warrant] clause . . . because their prime purpose was to prohibit the oppressive use of warrants"). Professor Taylor further states: "They took for granted that arrested persons could be searched without a search warrant, and nothing gave them cause for worry about warrantless searches." *Id.*; see also Amar, *supra* note 25, at 763 (finding support through examination of early state constitutions for his argument that the Fourth Amendment did not intend the warrant requirement). Warrant requirement proponents, however, have supported their position with historical evidence too. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 822–23 (1994) (providing examples of how warrant requirement scholars "fight fire with fire" by responding to Professor Amar with the history of the Fourth Amendment to support their position).

33. See, e.g., Amar, *supra* note 25, at 761 ("The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures. They do not require probable cause for all searches and seizures without warrants.").

34. See *supra* note 30 and accompanying text (quoting Justice Scalia's concurring opinion in *Acevedo*).

35. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 745 (7th ed. 2007) (stating that social costs realized by searches and seizures support regulation of searches and seizures "so that the police do not conduct searches when the social costs exceed the social benefits").

36. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 460 (1990) (Stevens, J., dissenting). More accurately, only one driver was arrested pursuant to the checkpoint stop. See *id.* at 448 (majority opinion) ("Two drivers were detained for field sobriety testing, and one of the two was arrested for driving under the influence of alcohol. A third driver who drove through [the checkpoint] without stopping was pulled over by an officer in an observation vehicle and arrested for driving under the influence.").

37. See *id.* at 448 (majority opinion) (stating the procedural posture of the case).

ruled for respondents, and petitioners—the police department—appealed to the Supreme Court.<sup>38</sup>

Chief Justice Rehnquist, writing for the majority, applied the reasonableness test from *Brown v. Texas*<sup>39</sup> and held that sobriety checkpoints are not per se unconstitutional.<sup>40</sup> In *Brown*, the Court asked "whether appellant [Brown] was validly convicted for refusing to comply with a policeman's demand that he identify himself pursuant to a provision of the Texas Penal Code which makes it a crime to refuse such identification on request."<sup>41</sup> The conviction was valid only if the initial stop was lawful.<sup>42</sup> In finding the initial stop unlawful, the Court first asserted that the initial police stop was a "seizure" within the meaning of the Fourth Amendment.<sup>43</sup> The Court then set out its balancing test to determine the reasonableness of the initial stop: "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."<sup>44</sup> The Court further stated that "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."<sup>45</sup> The *Brown* police could avail themselves of neither "specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual" nor "a plan embodying explicit, neutral limitations on the conduct of individual officers," tipping the scales in favor of Brown.<sup>46</sup>

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38. *Id.*

39. *See Brown v. Texas*, 443 U.S. 47, 53 (1979) (concluding that the conviction of appellant for refusing to identify himself to a police officer could not stand "because the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct").

40. *See supra* note 14 and accompanying text (stating the *Sitz* holding). *Compare supra* note 39 and accompanying text (articulating the *Brown* balancing test), *with Sitz*, 496 U.S. at 455 (balancing "the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped").

41. *Brown*, 443 U.S. at 48.

42. *Id.* at 50–51.

43. *Id.* at 50.

44. *Id.* at 50–51.

45. *Id.* at 51.

46. *See id.* at 52 ("In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference.").

Consistent with *Brown*, *Sitz* first declared checkpoint stops "seizures," thereby placing them within the scope of the Fourth Amendment.<sup>47</sup> At this point, rather than determine whether the *Sitz* police department could articulate probable cause or reasonable suspicion—consistent with the warrant preference rule—for any of the 126 checkpoint stops conducted that morning, and without expressly declaring the drunk-driving problem a "special needs" exception, the Court immediately proceeded with the balancing test.<sup>48</sup> After weighing the competing interests, the Court ruled in favor of the state program.<sup>49</sup>

Both dissenting opinions were alarmed particularly by the majority's easy dismissal of the individualized reasonable suspicion requirement.<sup>50</sup> To the dissenting justices, the appropriate judicial inquiry should have begun with the recognition that any search or seizure conducted without individualized reasonable suspicion is presumptively unreasonable.<sup>51</sup> Justice Brennan argued, "Only when a seizure is *substantially* less intrusive than a typical arrest is the general rule replaced by a balancing test."<sup>52</sup> Even though Justice Brennan "agree[d] with the Court that the initial stop of a car at a roadblock . . . is sufficiently less intrusive than an arrest,"<sup>53</sup> he would have used this finding to *trigger* the balancing test rather than to justify conclusively the reasonableness of checkpoint stops.<sup>54</sup> Put differently, even though the ultimate judicial inquiry was *Brown*-balancing, Justice Brennan criticized the majority's judicial

47. Mich. Dep't of State Police v. *Sitz*, 496 U.S. 444, 450 (1990) ("Petitioners concede, correctly in our view, that a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint.").

48. See *id.* at 450–51 (accepting *Brown* as the correct judicial precedent, stating that the checkpoint stop is a "seizure" within the scope of the Fourth Amendment, limiting the discussion to the "use of sobriety checkpoints generally," and then discussing the governmental interest prong of *Brown*-balancing).

49. See *infra* Part III (examining further the competing interests).

50. See *Sitz*, 496 U.S. at 456–57 (Brennan, J., dissenting) ("The majority opinion creates the impression that the Court generally engages in a balancing test in order to determine the constitutionality of all seizures, or at least those dealing with police stops of motorists on public highways." (quotations omitted)); *id.* at 473 (Stevens, J., dissenting) ("The most disturbing aspect of the Court's decision today is that it appears to give no weight to the citizen's interest in freedom from suspicionless unannounced investigatory seizures.").

51. *Id.* at 457 (Brennan, J., dissenting) ("In most cases, the police must possess probable cause for a seizure to be judged reasonable.").

52. *Id.* (quotations omitted).

53. *Id.*

54. See *id.* ("[T]he [majority] opinion reads as if the minimal nature of the seizure *ends* rather than begins the inquiry into reasonableness."). Justice Brennan emphasized, "[O]ne searches the majority opinion in vain for any acknowledgment that the *reason* for employing the balancing test is that the seizure is minimally intrusive." *Id.*

procedure as deceptive.<sup>55</sup> In the end, *Sitz* produced two dissenting opinions—rather than two concurring in the judgment opinions—because both dissenting opinions disagreed with the majority’s application of *Brown*-balancing, arguing that the scales should have tipped in favor of the respondent.<sup>56</sup>

#### D. *The Economics of Fourth Amendment Reasonableness*

The Fourth Amendment invites economic analysis because the amendment does not articulate a clear reasonableness standard of its own. The economic interpretation of the Fourth Amendment does not advance the warrant preference rule or *Sitz*-reasonableness.<sup>57</sup> The concerns of a warrant preference advocate do not necessarily trouble the economist when police agencies conduct seizures of persons without individualized suspicion.<sup>58</sup> The economic approach, importantly, does not require the issuance of a warrant from a neutral and detached magistrate upon a showing of probable cause to render a seizure constitutionally reasonable.<sup>59</sup> Further, Fourth Amendment

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55. Compare *supra* notes 50–54 and accompanying text (noting Justice Brennan’s criticisms of the majority opinion), with *supra* Part II.B (noting reasonableness advocates’ criticisms of the warrant requirement). In a way, Chief Justice Rehnquist’s majority opinion underscores reasonableness advocates’ criticism of the various exceptions to the warrant preference rule. That is, what significance does an exception have if the exception leads to a reasonableness inquiry? Why can’t reasonableness be the starting point if that’s where the Court is going anyway?

56. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 456 (1990) (Brennan, J., dissenting) (“I agree [with Justice Stevens] that the Court misapplies th[e] [balancing] test by undervaluing the nature of the intrusion and exaggerating the law enforcement need to use the roadblocks to prevent drunken driving.”). Importantly, the difference of opinion is more fundamental than a different balancing outcome. The difference reflects different fundamental interpretations of the Fourth Amendment.

57. Compare *supra* Parts II.A, II.C (presenting the warrant preference rule and *Sitz*-reasonableness), with *infra* notes 58–74 and accompanying text (presenting the economic approach).

58. Compare *supra* Part II.A (stating the warrant preference argument), with *infra* note 61 and accompanying text (presenting the law and economics argument that minimal searches and seizures may be justified in the absence of a warrant when the social benefit of detecting a serious crime outweighs minimal intrusions of privacy).

59. Cf. POSNER, *supra* note 35, at 746–47 (expressing in economic terms the “plain view” rule and searches relating to investigations of terrorism). The Court recognizes the plain view doctrine as an exception to the warrant requirement. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (“Under th[e] [plain view] doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.”). Judge Posner provides the economic rationale behind the plain view doctrine:

reasonableness to the economist may not require individualized, or even collective, suspicion.<sup>60</sup>

The economic approach, then, fits *within* the general reasonableness approach from Part II.B, albeit uniquely, because it considers social benefits and social costs objectively without according deference to politically accountable officials.<sup>61</sup> As applied to sobriety checkpoints, the economist is more concerned with the efficiency of conducting these suspicionless seizures; put differently, the economist determines whether sobriety checkpoints maximize aggregate social utility—whether the governmental decision to

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[I]f the police conduct a search or seizure for a proper reason and in the course of it discover unanticipated evidence of crime, they can use it without any showing of probable cause or reasonable (or indeed) any [sic] suspicion. The reason, in economic terms, is that the incremental cost, in invasion of privacy, to the person searched or seized is zero.

POSNER, *supra* note 35, at 746. In other words, if the incremental social cost is zero, and the social benefit of allowing the officer to seize unanticipated evidence of crime in plain view is greater than zero, the plain view search is reasonable notwithstanding warrant preference considerations. *Id.* Regarding terrorist investigations, Judge Posner presents the applicability of law-and-economics as follows: "[T]he more serious the crime [e.g., terrorist attacks], the less probable cause the police should need in order to justify a search of a given intrusiveness." *Id.* This rationale justifies the suspicionless searches of subway riders' bags in New York City, even when the New York Police Department "apparently [had] no evidence that an attack was planned or imminent." *Id.* at 747.

60. See, e.g., POSNER, *supra* note 35, at 746 (citing *Illinois v. Lidster*, 540 U.S. 419 (2004), to support the proposition that "[t]he lower the costs of the search, the fewer anticipated benefits must be shown to justify it"). In *Lidster*, the Court "upheld against Fourth Amendment challenge a roadblock that police had set up to stop cars so that the drivers could be asked for information about a recent hit-and-run accident." *Id.* Judge Posner emphasizes that *Lidster* is "important precedent because it divorces searching from suspicion." *Id.* Judge Posner further states, "[*Lidster*] allows surveillance that invades liberty and privacy to be conducted because of the importance of the information sought, even if it is not sought for use in a potential criminal proceeding against the people actually under surveillance." *Id.*

61. See, e.g., *id.* at 745–47 (applying the Hand Formula to the Fourth Amendment and speaking generally on its application to roadblocks); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 463 (2006) (applying the Hand Formula to determine whether officers have sufficient reasonable suspicion to conduct a search or seizure). In *United States v. Carroll Towing Co.*, Judge Learned Hand proposed a formula for determining liability in an action for negligence known colloquially as the Hand Formula. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability be called *P*; the injury, *L*; and the burden, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether *B* is less than *PL*"). Judge Posner borrows the Hand Formula and states that "[a] search (or seizure) is reasonable if the cost of the search in privacy impaired (*B*) is less than the probability (*P*) that without the search the target of the search cannot be convicted or otherwise rendered harmless . . . , multiplied by the social loss (*L*) if he eludes punishment." POSNER, *supra* note 35, at 746. If the Hand Formula lends guidance to Fourth Amendment reasonableness determinations, then valuations of the competing interests supported by empirical data may inform one of the future valuations.

allocate its limited resources to sobriety checkpoints maximizes aggregate social benefit in light of social cost.<sup>62</sup>

The economic approach examines social benefits realized by the use of the sobriety checkpoints, including property damage avoided, personal injuries avoided, and successful arrests and convictions.<sup>63</sup> Contrast this approach with *Sitz*-reasonableness, which qualified the meaning of the "effectiveness" prong set forth in *Brown*—"the degree to which the seizure advances the public interest"—to require a high degree of deference to government officials.<sup>64</sup> The Court said, "[The] passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger."<sup>65</sup> The level of deference is significant because the Court further argued that sobriety checkpoints could satisfy the effectiveness prong in the absence of supportive empirical data.<sup>66</sup> Again, the economic approach does not accord deference and looks to empirical data to support the legitimacy of the sobriety checkpoint.<sup>67</sup>

The *Sitz* litigation, however, provided some empirical evidence: The arrest rate at the *Sitz* checkpoint was 1.6%.<sup>68</sup> One can draw another distinction between *Sitz*-reasonableness and economic reasonableness by examining how the Court interpreted this statistic and how an economist would interpret this statistic. The Court compared the arrest rate at the sobriety checkpoint to the relatively lower arrest rate at an immigration checkpoint at issue in another case.<sup>69</sup> Because the Court upheld the suspicionless stops at the immigration

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62. See *infra* Part III.A (discussing the government's interest in using sobriety checkpoints to combat drunk driving).

63. See *infra* Part III.B (discussing the effectiveness of the sobriety checkpoint to reduce drunk driving). This Note follows the majority of reports provided by the National Highway Traffic Safety Administration (NHTSA) by measuring the effectiveness of a sobriety checkpoint by lives saved.

64. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453–55 (1990) (disagreeing with the Michigan Court of Appeals's application of effectiveness review and clarifying the standard derived from *Brown*).

65. *Id.* at 453.

66. See *id.* at 454 (comparing this situation with that in *Delaware v. Prouse*, 440 U.S. 648 (1979), where the Court reviewed no empirical evidence and yet made a decision as to the reasonableness of the stop).

67. See *infra* Part III.B (noting empirical observations).

68. See *Sitz*, 496 U.S. at 455 ("[A]pproximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped.").

69. See *id.* at 454–55 (comparing the arrest rate from *United States v. Martinez-Fuerte*,

checkpoint, the Court applied transitive logic to justify upholding the suspicionless stops at the sobriety checkpoint, arguing: If the arrest rate of the immigration checkpoint satisfies the *Brown* effectiveness prong, and the arrest rate of the immigration checkpoint was less than the arrest rate at the sobriety checkpoint, then the arrest rate of the sobriety checkpoint satisfies the *Brown* effectiveness prong.<sup>70</sup> This argument is improper under the economic approach because the checkpoints may serve different purposes. For example, the immigration checkpoint may serve only to detect and arrest illegal immigrants.<sup>71</sup> The sobriety checkpoint, as this Note later demonstrates, serves not only to arrest drunk drivers but, more importantly, to *deter* drunk driving generally.<sup>72</sup> The arrest rate at the sobriety checkpoint, therefore, is fairly inconsequential and does not indicate the checkpoint's effectiveness. The economist, therefore, narrowly examines how sobriety checkpoints achieve specific policy goals.

With respect to social cost, the economic approach is far superior to *Sitz*-reasonableness because the economic approach at least attempts to value subjective intrusion. *Sitz*'s inability to value subjective intrusion is the primary reason why *Sitz* produced two dissenting, rather than two concurring in the judgment, opinions.<sup>73</sup> The economic approach, on the other hand, looks to public opinion surveys to shed light on a proper valuation of subjective intrusion.<sup>74</sup>

With an understanding of the economic approach to Fourth Amendment reasonableness, this Note returns to the variables governing sobriety checkpoint reasonableness.

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428 U.S. 543 (1976), with the arrest rate from the sobriety checkpoint in *Sitz*).

70. See *id.* at 455 (reasoning that, when the *Martinez-Fuerte* record indicated an arrest rate as low as 0.12%, there is "no justification for a different conclusion" in *Sitz* when the *Sitz* checkpoint had an arrest rate of "approximately 1.6 percent").

71. The purpose of an immigration checkpoint is beyond the scope of this Note.

72. See *infra* Part III.A.2 (discussing the purpose of the sobriety checkpoint).

73. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 456 (1990) (Brennan, J., dissenting) ("[T]he Court . . . undervalu[es] the nature of the intrusion . . ."); *id.* at 462–63 (Stevens, J., dissenting) ("The Court . . . undervalues the citizen's interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is 'virtually no difference' between a routine stop at a permanent, fixed checkpoint and a surprise stop at a sobriety checkpoint.").

74. See *infra* Part III.C (interpreting public opinion polls).

### III. Sobriety Checkpoint Reasonableness: The Variables

This Note now turns to the three variables that determine whether a sobriety checkpoint stop is an unreasonable seizure within the meaning of the Fourth Amendment—namely, "the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists."<sup>75</sup>

#### A. The State's Interest in Preventing Drunk Driving

##### 1. The State as a Rational Maximizer

The state must have a valid interest in preventing drunk driving. In *Sitz*, the Court assumed that this interest was indisputable.<sup>76</sup> This Note, however, examines the assumption through economic principles because its validity informs why the government chooses sobriety checkpoints as a means to achieve that end. The discussion, then, begins with the state as a rational maximizer. First, enforcement agencies—like all governmental agencies—have limited resources to enforce the law.<sup>77</sup> This is the scarcity axiom and its premise is undisputed.<sup>78</sup>

How, then, does the enforcement agency decide to allocate its limited resources? It is axiomatic under economic theory that *individuals* are self-interested rational maximizers<sup>79</sup>—that is, an individual living in a world "in

75. *Sitz*, 496 U.S. at 455 (majority opinion).

76. *See id.* at 451 ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it.").

77. *See, e.g., id.* at 454 (noting that government has "limited public resources, including a finite number of police officers").

78. *See, e.g.,* DAVID W. BARNES & LYNN A. STOUT, *CASES AND MATERIALS ON LAW AND ECONOMICS* 4 (1992) ("Scarcity in an economic sense means that the item's supply is sufficiently limited that not enough exists to satisfy all desires."). It follows that government is unable to prevent and punish all crime because the requisite public resources to achieve that end are limited.

79. *See, e.g.,* POSNER, *supra* note 35, at 3–10 (articulating the fundamental concepts of the nature of economic reasoning). On rational maximization, Judge Posner stated:

[M]an is a rational utility maximizer in *all* areas of life, not just in his "economic" affairs, that is, not only when engaged in buying and selling in explicit markets. This idea goes back to Jeremy Bentham in the eighteenth and early nineteenth century, but received little attention from economists until the work of Gary Becker in the 1950s and 1960s.

The concept of man as a rational maximizer implies that people respond to incentives—that if a person's surroundings change in such a way that he could



which resources are limited in relation to human wants" will allocate her resources in a way to maximize her satisfaction (i.e. maximize her utility).<sup>80</sup> Whether the *state* is a rational maximizer is a different question. But if state action is a function of political decision-making, an analysis of political decision-making by politicians themselves may provide guidance in answering the question. This Note takes direction from notable economist Anthony Downs, who posits that politicians "act solely in order to attain the income, prestige, and power which come from being in office."<sup>81</sup> Further, "politicians . . . never seek office as a means of carrying out particular policies; their only goal is to reap the rewards of holding office *per se*. They treat policies purely as means to the attainment of their private ends, which they can reach only by being elected."<sup>82</sup> Put differently, power, prestige, and income will not follow unless the politician is elected; politicians are not elected without votes. Politicians (and their parties), therefore, "treat[] policies merely as a means toward [maximizing votes]."<sup>83</sup>

The issue then turns to how policies maximize votes. Individual citizens cast votes—and the voter's decision for whom to cast a vote necessarily involves rational maximization.<sup>84</sup> A rational voter votes for whomever "yields him the highest utility, *ceteris paribus*; i.e., he acts to his own greatest benefit."<sup>85</sup> Political officials, therefore, in acting for *their* greatest benefit, promote policies that advance the highest utility for the majority of citizens relative to competing politicians' policies.<sup>86</sup>

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increase his satisfactions by altering his behavior, he will do so.

*Id.* at 4.

80. *Id.* at 3.

81. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 28 (1957).

82. *Id.*

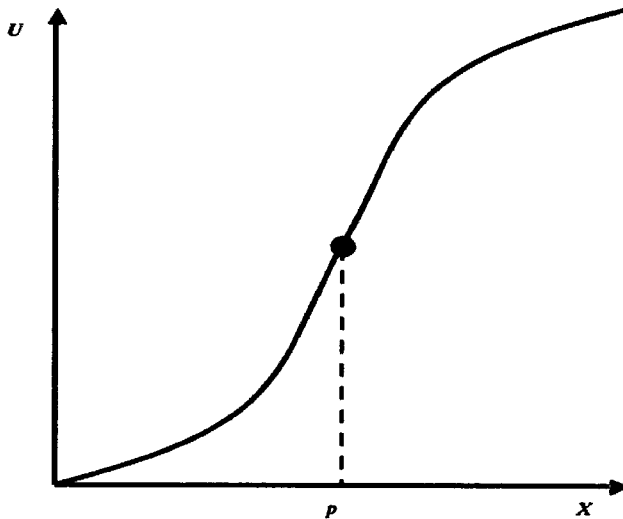
83. *Id.* at 35.

84. *See id.* at 36 ("[E]ach citizen casts his vote for the party he believes will provide him with more benefits than any other.").

85. *Id.* at 36–37.

86. *See id.* at 52 ("[G]overnment decision-making occurs in a tangled context of economic optimums and political warfare."). Of course, the term "economic optimums" represents maximized social utility. *Id.* "Political warfare," on the other hand, reflects that elected government officials "must take into account [in their decision-making] not only the voters' utility functions, but also the proposals made by its [political] opponents." *Id.* (emphasis added). "Political warfare" does not undercut the premise that considerations of social utility affect government decision-making. After all, politicians engaged in political warfare are fighting to maximize votes. Political warfare, however, describes the incremental procedure of government decision-making—*i.e.*, "we assume that the new[ly] [elected] government makes only partial alterations in the scheme of government activities inherited from the preceding administration; it does not recreate the whole scheme." *Id.* at 53.

The preceding paragraphs discussed what motivates politicians to advocate policy—power and prestige. The discussion now turns more specifically to what motivates *elected* government officials' decision-making—how can elected officials retain power and prestige when making decisions to allocate finite public resources? The prior discussion informs the current one. Downs argues, "[The] government carries out those acts of spending which gain the most votes by means of those acts of financing which lose the fewest votes. In other words, expenditures are increased until the vote-gain of the marginal dollar spent equals the vote-loss of the marginal dollar financed."<sup>87</sup> This is the concept of marginal operations.<sup>88</sup> The concept of marginal operations is more clearly understood through graphical representation. Thus, when  $x$  represents the expenditures allocated along the  $x$ -axis,  $U$  represents the votes gained from the expenditure along the  $y$ -axis, and  $p$  represents when the marginal dollar spent equals the vote loss of the marginal dollar financed:

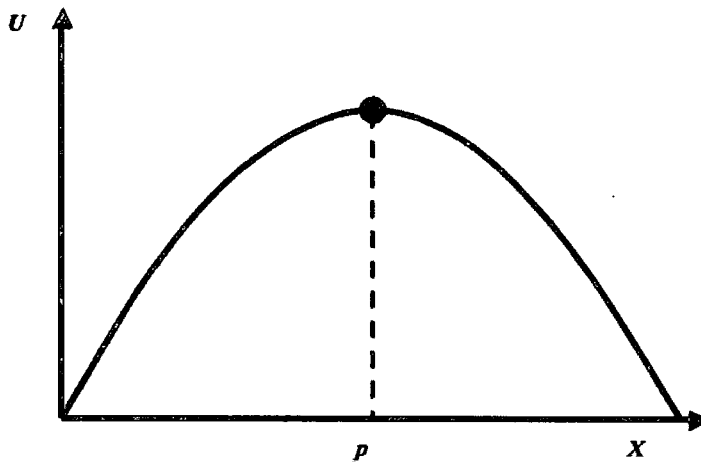


It is easier to spot point  $p$ —the point at which the marginal vote-gain no longer increases—through a derivative<sup>89</sup> of the above graphical representation:

87. *Id.* at 52.

88. *Id.*

89. See JOHN BERRY ET AL., *DICTIONARY OF MATHEMATICS* 65 (1999) ("[T]he derivative of a function gives its rate of change or, for a curve, its gradient."). Point  $p$  also is known as an inflection point. See *DICTIONARY OF ALGEBRA, ARITHMETIC, AND TRIGONOMETRY* 141 (Steven G. Krantz ed., 2001) (defining inflection point as "[a] point on a plane curve at which the curve switches from being concave to convex, relative to a fixed line").



The derivative clearly illustrates that the marginal utility of expending additional public resources on a certain governmental program—votes gained—increases before and decreases after the point  $p$ .

With respect to governmental decision-making and drunk driving, the history of the criminalization of drunk driving and prosecutorial attention suggest that elected officials still perceive a positive marginal utility in financing enforcement programs toward that end—i.e., government spending on drunk driving enforcement programs has not yet reached point  $p$  in the above graphs. Economic theory looks at individual behavior to determine utility valuations.<sup>90</sup> Here, statutory enactments indicate how self-interested elected legislators value the marginal benefit of drunk driving legislation.

Grass-roots organizations, such as Remove Intoxicated Drivers (RID), Mothers Against Drunk Driving (MADD), and Students Against Drunk Driving (SADD), successfully brought the war against drunk driving into the national spotlight—and legislators reacted.<sup>91</sup> Congress, for example, enacted the National Minimum Drinking Age Act of 1984,<sup>92</sup> which threatens to withhold a certain percentage of federal transportation funding from a state unless the state increases its lawful minimum drinking age for purchase and

90. See, e.g., BARNES & STOUT, *supra* note 78, at 5 ("[E]conomists prefer whenever possible to rely on the individual's behavior as the best measure of the value she attaches to that good or service. . . . The economist's assumption that individuals' actual choices reflect their preferences and values is described as the theory of revealed preferences.").

91. See, e.g., JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA*, at xv–xvii (1989) (describing the "extraordinary grass roots anti-drunk driving movement" beginning in the late 1970s and continuing throughout the 1980s).

92. National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (2006).

public possession of alcohol to at least twenty-one years of age.<sup>93</sup> All states fully complied soon thereafter.<sup>94</sup> In 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21),<sup>95</sup> which pressured the states to move toward a nation-wide illegal per se blood alcohol concentration (BAC) level of 0.08% or greater, down from 0.10% or greater.<sup>96</sup> The current statute provides additional federal assistance to states that enforce the 0.08% or greater standard.<sup>97</sup> The states complied again.<sup>98</sup> Further, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for

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93. *See id.* § 158(a)(1). The National Minimum Drinking Age Act of 1984 states, in part, the following:

The Secretary [of Transportation] shall withhold 10 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(3), and 104(b)(4) of this title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

*Id.*

94. *See* J.H. Hedlund et al., *Determine Why There Are Fewer Young Alcohol Impaired Drivers*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUBL'N NO. DOT HS 809 348 (2001), <http://www.nhtsa.dot.gov/people/injury/research/FewerYoungDrivers/index.htm#toc> (follow "Appendix" hyperlink) (last visited Mar. 22, 2010) (providing the effective date of each state's respective minimum age drinking law) (on file with the Washington and Lee Law Review). South Dakota was the last to comply, effective April 1, 1988. *See* S.D. CODIFIED LAWS § 35-9-4.1 (2004) ("The South Dakota Legislature enacts chapter 261 of the 1987 Session Laws to raise the state's minimum drinking age to twenty-one years of age solely under the duress of a funding sanction imposed by the United States Department of Transportation under 23 U.S.C § 158.").

95. Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998) (codified as amended in scattered sections of 23 U.S.C.).

96. *See* TEA-21 § 1404, 23 U.S.C. § 163(a) (2006) (providing federal grants to states that have enacted and enforce 0.08% BAC laws). TEA-21 states:

The Secretary [of Transportation] shall make a grant, in accordance with this section, to any State that has enacted and is enforcing a law that provides that any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated (or an equivalent per se offense).

*Id.*; *see also* MARGARET C. JASPER, *DWI, DUI AND THE LAW* 49 (2004) (describing the 0.08% directive).

97. *See supra* note 96 and accompanying text (quoting the statute).

98. *See* JASPER, *supra* note 96, at 115–16 (providing a complete list of illegal BAC levels by state, including the District of Columbia). Minnesota was the last to move to the 0.08% standard; Minnesota's illegal per se statute was effective as of August 1, 2005. *See* MINN. STAT. ANN. § 169A.20(1) (2006) ("It is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state . . . (5) when the person's alcohol concentration at the time . . . of driving, operating, or being in physical control of the motor vehicle is 0.08 or more . . .").

Users (SAFETEA-LU) in 2005.<sup>99</sup> SAFETEA-LU amended preexisting federal incentive programs under 23 U.S.C. § 410, providing federal grants to qualified states if one of two conditions is met: The state is eligible when its alcohol related fatality rate is at or below 0.5 persons per one-hundred million vehicle miles traveled.<sup>100</sup> Alternatively, the state is eligible when it carries out at least five statutorily defined state "alcohol-impaired driving countermeasures."<sup>101</sup> The statute then provides eight possible countermeasures that satisfy this alternative requirement: (1) a checkpoint or saturation patrol program;<sup>102</sup> (2) a prosecution and adjudication outreach program;<sup>103</sup> (3) increased testing of BAC for drivers involved in fatal accidents;<sup>104</sup> (4) providing stronger sanctions for high risk drivers;<sup>105</sup> (5) programs for effective alcohol rehabilitation and DWI courts;<sup>106</sup> (6) an underage drinking program;<sup>107</sup> (7) administrative license revocation;<sup>108</sup> and (8) a self-sustaining impaired driving prevention program.<sup>109</sup> Most states do not meet the first requirement and, therefore, must implement at least five of the eight listed programs to be eligible for federal grants.<sup>110</sup> SAFETEA-LU, therefore, requires additional public resources for sustainability by increasing the presence of alcohol-impaired driving countermeasures, including sobriety checkpoints.

99. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144 (2005) (codified as amended in scattered sections of 23 U.S.C.).

100. See SAFETEA-LU § 2007(b)(3), 23 U.S.C. § 410(b)(1) (2006) (defining the alcohol related fatality rate to be the "rate of 0.5 or less per 100,000,000 vehicle miles traveled as of the date of the grant, as determined by the Secretary using the most recent Fatality Analysis Reporting System of the National Highway Traffic Safety Administration").

101. See *id.* § 410(b)(2)(C) (requiring at least five state programs for the fiscal year of 2009).

102. *Id.* § 410(c)(1); see also Stuster, *supra* note 8, at D-3 (distinguishing roving patrols from saturation patrols).

103. 23 U.S.C. § 410(c)(2).

104. *Id.* § 410(c)(3).

105. *Id.* § 410(c)(4).

106. *Id.* § 410(c)(5).

107. *Id.* § 410(c)(6).

108. *Id.* § 410(c)(7). See N.Y. VEH. & TRAF. LAW § 1194.2 (McKinney 2008) for an example of an administrative license revocation statute.

109. 23 U.S.C. § 410(c)(8) (2006).

110. See Rajesh Subramanian, *State Alcohol Related Fatality Rates*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUBL'N NO. DOT HS 809 830, at 6 (2005), available at <http://www-nrd.nhtsa.dot.gov/cats/listpublications.aspx?Id=C&ShowBy=DocType> (follow "State Alcohol-Related Fatality Rates 2003" hyperlink) (demonstrating that seventeen states had an alcohol-related fatality rate of 0.50 or less per one-hundred million vehicle miles traveled in 2003). Figures for the years 2004 to present are currently unavailable.

These political actions—the National Minimum Age Drinking Act of 1984, TEA-21, and SAFETEA-LU—exhibit continued motivation to expend more and more public resources on the war against drunk driving. Applying Downs's theory, then, the legislators who enact these statutes—and the executives who enforce them—are motivated by the power and prestige of their positions to make their decisions. These politically accountable authorities achieve their status by maximizing votes or voter support. Individuals, in turn, vote for whomever maximizes their own utility. Motivated special interest groups—RID, MADD, and SADD—have gathered a significant number of individuals behind their collective mission: Individual happiness (or utility) is further maximized when legislation and enforcement agencies reduce the harm caused by drunk driving to zero.<sup>111</sup> Political officials, therefore, are highly motivated to promote enforcement programs that maximize their enforcement capabilities, which may run against Fourth Amendment protections.

If one does not believe that vote-maximization dictates government interest as a rational maximizer, then one can at least take direction from the Court. In *Sitz*, the Court noted that "for purposes of Fourth Amendment analysis, the choice among . . . reasonable alternatives remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources . . ." <sup>112</sup> The language evokes economic theory and, more specifically, the principles of scarcity and rational-maximization. If the Court grants broad deference to governmental officials and to their decision-making with regard to limited public resources, then it is not unreasonable to assert that the Court assumes, for the limited purposes of sobriety checkpoint analysis, that governmental officials exercise rational choice in making their decisions. In other words, the Court would not grant broad deference to governmental decisions on drunk driving if it had reason to believe that these governmental decisions were irrational.

This Note has so far articulated a theory of why the government, as a rational maximizer, is motivated to combat drunk driving. This Note now turns to why the government chooses sobriety checkpoints in particular as an enforcement program to combat drunk driving.

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111. See, e.g., JASPER, *supra* note 96, at 35 (citing the NHTSA for the proposition that "almost 75% of Americans think penalties for drinking and driving should be more severe"); see also Mothers Against Drunk Driving, Mission Statement, <http://www.madd.org/About-us/About-us/Mission-Statement.aspx> (last visited Mar. 22, 2010) ("The mission of MADD is to stop drunk driving . . .") (on file with the Washington and Lee Law Review).

112. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–54 (1990).

## 2. Narrowing the Interest

The political decision to promote the use of sobriety checkpoints as an effective enforcement program is a means to achieve the broader political goal of governmental decision-makers to fight drunk driving, maximize voter happiness, and maximize voter support. How, then, does the sobriety checkpoint maximize individual happiness? The answer depends on the sobriety checkpoint's ability to *remove* drunk drivers from the roads and *deter* motorists from drinking and driving. To that end, one thing is certain: Even though sobriety checkpoints are clearly designed to apprehend individuals driving under the influence of intoxicating substances,<sup>113</sup> sobriety checkpoints are an inefficient means by which to remove drunk drivers from the road and do little to advance that governmental interest relative to other enforcement programs.<sup>114</sup> The government concedes this point.<sup>115</sup> Not only does the government concede that sobriety checkpoints do little to advance its interest in apprehending drunk drivers, the government concedes further that the diversion of government resources from other drunk driving enforcement programs—such as directed patrols and saturation patrols—may cause the arrest yield to *decrease*.<sup>116</sup> If sobriety checkpoints are negligible or even *counterproductive* to society's interest in removing drunk drivers from public roads, then the value of sobriety checkpoints must be a function of the program's ability to *prevent* impaired drivers from operating a motor vehicle in the first place.

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113. See *id.* at 470 n.13 (Stevens, J., dissenting) (noting Michigan's court brief, which states that "the [sobriety checkpoint] program is . . . clearly designed to apprehend any drunk drivers who pass through the checkpoint").

114. See *id.* at 455 (majority opinion) ("[A]pproximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped."). But see *id.* at 469 n.11 (Stevens, J., dissenting) ("The Court refers to an expert's testimony that the arrest rate is 'around 1 percent,' but a fair reading of the entire testimony of that witness, together with the other statistical evidence in the record, points to a significantly lower percentage.").

115. See *id.* at 470 n.13 (Stevens, J., dissenting) (providing testimony from a Michigan police official who admitted that the "purpose in effectuating or attempting to effectuate" the checkpoint at issue was "not to obtain large numbers of arrest [sic] of drunk drivers").

116. See T.J. Zwicker et al., *Connecticut's 2003 Impaired-Driving High-Visibility Enforcement Campaign*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUBL'N NO. DOT HS 810 689, at 30 (2007), available at <http://www-nrd.nhtsa.dot.gov/Pubs/810689.PDF> ("Refocusing law enforcement efforts away from activities such as directed patrols and saturation patrols, which traditionally yield many more DWI [Driving While Intoxicated] arrests than sobriety checkpoints, was expected to lead to a similar number of DWI arrests or even fewer DWI arrests." (emphasis added)).

The thrust of the sobriety checkpoint, then, is deterrence—more specifically, general deterrence.<sup>117</sup> After all, "[c]learly, society wants to *prevent* dangerous driving."<sup>118</sup> Again, drunk driving places life and property at risk of harm. The sobriety checkpoint "mobiliz[es] the criminal justice system against the drunk driver *before* any harm or specific risks develop or driving violations occur."<sup>119</sup> The sobriety checkpoint, therefore, is a preventative strategy.

The effectiveness of a deterrent enforcement program depends on perceptions of apprehension.<sup>120</sup> That is, if an enforcement program increases perceptions of apprehension, then the deterrent value of the program increases. Conversely, if an enforcement program has no positive incremental effect on perceptions of apprehension, then the enforcement program has no deterrent value. Perceptions of apprehension, in turn, depend on awareness and perceived risk of apprehension. An enforcement program, obviously enough, has no deterrent value if no one is aware of its existence or its consequences. Once an individual is aware of the existence of the program, however, the program's deterrent value then falls on the individual's perceived risk of apprehension. The individual perceives some risk or probability of apprehension, ranging from no risk of apprehension to complete risk of apprehension. Given that risk, the individual must decide whether to commit the illegal act and possibly face the consequences of committing the act or not. The theories of rational choice and expected utility dictate that individual's decision.<sup>121</sup>

For example, a Texas legislator recently filed a bill that would at least double the minimum fine of a traffic offense if the driver was using the car

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117. See, e.g., *Sitz*, 496 U.S. at 470 n.13 (Stevens, J. dissenting) ("[Michigan] said: 'Deterrence and public information are the primary goals of the sobriety checkpoint program . . .'"). Justice Stevens further argues that, "[e]ven if the checkpoint is designed to produce some arrests, it does not follow that it has been adopted in order to produce arrests, or that it can be justified on such grounds." *Id.* In other words, Justice Stevens argues that the effectiveness of the checkpoint cannot be measured by the arrests it produces; rather, if the purpose of the checkpoint is to deter, then the effectiveness of the checkpoint must be measured by its deterrent effect. This Note takes direction from Justice Stevens in Part III.B. Others may describe "general deterrence," as used in this Note and as referred to in *Sitz* as "general prevention." See ROSS HOMEL, *POLICING AND PUNISHING THE DRINKING DRIVER* 30 (1988) ("[G]eneral deterrence is reserved for the fear component of law, and general prevention for the (usually) long-term educative or habit-forming effects.").

118. JACOBS, *supra* note 91, at 60.

119. *Id.* (emphasis added).

120. See, e.g., Stuster, *supra* note 8, at D-13 ("[T]o be effective deterrents, checkpoints must be perceived by the public to substantially increase the probability of detection and arrest for those driving while impaired.").

121. See, e.g., HOMEL, *supra* note 117, at 31-34 (explaining the theory of expected utility in a more detailed fashion).



radio at the time of the offense.<sup>122</sup> Texas police officers commented that the bill, if it becomes law, would be difficult, if not impossible, to enforce.<sup>123</sup> If the enforcement capability is impossible, then the perceived risk of apprehension is zero and the bill has no deterrent value.<sup>124</sup> Therefore, assuming Texas citizens are aware of the bill and its sanctions—not an unreasonable assumption considering that the introduction of the bill became national news and would, conceivably, generate more headlines if it becomes law<sup>125</sup>—Texans will nevertheless continue to scan the radio waves while driving because Texans perceive no risk of apprehension. Now assume that Texas police agencies have some enforcement capability for the bill. Texan motorists then make a rational choice to either change the dial when the motorist values the probability of receiving the sanction less than the value of changing the radio station or refrain from changing the dial when the motorist values the probability of receiving the sanction more than the value of changing the radio station.<sup>126</sup> The bill would then have deterrent value only to the extent that individual motorists choose to refrain from changing the radio dial.

Perceptions of apprehension are affected in two ways: through specific deterrence or general deterrence. First, specific deterrence "aims to deter the criminal himself (rather than to deter others) from committing further crimes, by giving him an unpleasant experience he will not want to endure again."<sup>127</sup> To be sure, sobriety checkpoints have some value as a specific deterrent. An individual arrested subsequent to a checkpoint stop, for example, is thereby deterred from drinking and driving in the future because she does not want to face arrest *again*. The number of individuals specifically deterred, however, depends on the number of individuals arrested; the arrest rate measures the sobriety checkpoint's value as a specific deterrent. The arrest rate, again, is

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122. See H.B. 738, 81st Legis., Reg. Sess. (Tex.).

123. See Lindsay Wilcox, *Bill: Distracted Drivers, Beware*, NBC DALLAS-FORT WORTH, Feb. 2, 2009, <http://www.nbcdfw.com/news/local/Bill-Distracted-Drivers-Beware.html?corder=&pg=1> (last visited Mar. 22, 2010) ("Law enforcement officers said they're sure the bill is well-intentioned, but questioned whether it would be enforceable.") (on file with the Washington and Lee Law Review).

124. See, e.g., HOMEL, *supra* note 117, at 32 ("[I]f the probability of capture is zero, . . . the rational individual would definitely commit the crime.")

125. See *supra* note 123 and accompanying text (noting NBC's reporting of the bill).

126. See, e.g., HOMEL, *supra* note 117, at 32 ("The rational individual maximizes h[er] expected utility, and hence commits the crime if [expected utility of committing the crime is greater than her original utility].")

127. WAYNE R. LAFAVE, *CRIMINAL LAW* 27 (4th ed. 2003). Professor LaFave calls it *particular* deterrence but this Note calls it *specific* deterrence. *Id.*

insufficient to justify checkpoint stops. The effectiveness of sobriety checkpoints, therefore, cannot be found through specific deterrence.

General deterrence, then, defines the governmental interest behind sobriety checkpoints.<sup>128</sup> Under general deterrence, "the sufferings of the criminal for the crime [s]he has committed are supposed to deter [or prevent] *others* from committing future crimes, lest they suffer the same unfortunate fate."<sup>129</sup> Greater is the sobriety checkpoint's "general deterrent effect on those passing through the roadblock and on the thousands more who see or hear reports of them" than its specific deterrent effect on those actually arrested.<sup>130</sup> For example, both drivers and passengers witnessing the enforcement program firsthand, and those hearing reports of it secondhand, greatly outnumber those actually arrested. The sobriety checkpoint did not specifically deter the 98.4% of motorists in *Sitz*—and potentially even more passengers—who witnessed the sobriety checkpoint but were not arrested. Rather, the sobriety checkpoint's purpose was to generally deter those motorists from drinking and driving in the future because the motorists' perceived risk of apprehension increased. Secondhand motorists, who learn of the sobriety checkpoint through news reports or general word-of-mouth, likewise are deterred generally from drinking and driving. The sobriety checkpoint intends to make motorists think before they drive—and, as one district attorney appropriately stated, "[a]nything that makes someone think before they make the bad decision to drink and get behind the wheel of a car, that's going to be a deterrent."<sup>131</sup>

Note, however, that any enforcement program that makes someone think negatively about politically accountable authorities will deter those authorities from implementing the enforcement program in the first place. The state's interest in preventing drunk driving, then, is not an independent variable within the *Brown*-balancing analysis. Rather, government interest in conducting sobriety checkpoints ( $G$ ) is a function of both the effectiveness of the checkpoint in terms of societal value gained ( $E$ ) and the social costs realized when the government allocates resources to a sobriety checkpoint program in terms of societal value lost ( $C$ ). Put simply:

$$G = f(E, C)$$

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128. See, e.g., ROSS, *supra* note 1, at 55 ("The principal opportunity for criminal law to be effective in reducing drunk driving is, paradoxically, not by affecting the apprehended law violators, who stand within its power. Rather, it lies in affecting un-apprehended individuals who are sensitive to the threat, should they behave illegally, they will be punished.").

129. *Id.* at 28 (emphasis added).

130. JACOBS, *supra* note 91, at 111.

131. 60 *Minutes*, *supra* note 2 (quoting Nassau County District Attorney Kathleen Rice (New York)).

As societal loss ( $C$ ) increases, government interest in continuing to exact those social costs from the public ( $G$ ) decreases; on the other hand, if the societal loss ( $C$ ) decreases, then government interest ( $G$ ) relatively increases. Similarly, when a police program demonstrates effectiveness ( $E$ )—when the sobriety checkpoint demonstrates sufficient ability to deter drunk driving and apprehend drunk drivers—the government interest ( $G$ ) in continuing the program increases.

With a working definition of the state's interest in preventing drunk driving, this Note now turns to the extent to which the sobriety checkpoint can reasonably be said to advance that interest.

### *B. The Extent to Which This System Can Reasonably Be Said to Advance That Interest*

#### *1. Empirical Observations*

The research on the extent to which the sobriety checkpoint can reasonably be said to deter drunk driving is, for the most part, inconclusive.<sup>132</sup> Empirical evidence, however, has produced some general observations from which this Note takes direction in formulating a model. Sobriety checkpoints (i) do not reduce the underlying motivation to drink and drive; (ii) do not deter chronic, much less all, drunk drivers; (iii) have a significant short-term impact to prevent drunk driving; (iv) need significant publicity and visible police enforcement to remain effective; and (v) may, if maintained and highly publicized, result in permanent reductions in drunk driving.

The first general observation derives from the fact that the sobriety checkpoint is a means to deter. H. Laurence Ross, a notable social scientist, wrote:

Perhaps the major limit of the deterrent approach to drunk driving lies in its failure to address the causes of the problem in the socially derived

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132. See Jennifer N. Dang, *Statistical Analysis of Alcohol-Related Driving Trends, 1982–2005*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUBL'N NO. DOT HS 810 942, at 21 (2008), available at [http://www.nhtsa.dot.gov/portal/nhtsa\\_static\\_file\\_downloader.jsp?file=/static+files/DOT/NHTSA/NCSA/Content/Reports/2008/810942.pdf](http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/static+files/DOT/NHTSA/NCSA/Content/Reports/2008/810942.pdf) (noting that sobriety checkpoints can be effective deterrents if adequately publicized, but failing to observe a "statistically significant association with our dependent variable"). In Dang's study, the dependent variable is the ratio of drivers involved in a fatal crash with a BAC of 0.08% or above to drivers under a BAC of 0.08%. *Id.* at 13. Dang also observed that "the proportion of drivers in fatal crashes—who had been drinking and had BAC of .08 or higher—decreased from 35 percent in 1982 to 20 percent in 1997 [and leveled off approaching 2005]." *Id.* at 1. Sobriety checkpoints, at least in Dang's study, demonstrated no correlation with the reduction of alcohol impaired fatal crashes.

motivation underlying the behavior in question. We attempt to deter behavior by severing the link between motivation and action. The motivation to engage in dangerous behavior is countered by a threat of punishment, but there is no direct attempt to reduce the motivation. Successful deterrence can be accomplished without knowing or understanding why people wish to engage in the prohibited behavior, but alternative approaches attempt to reduce the motivation through manipulating its social sources. Success in this endeavor requires a correct understanding of the institutional causes of the problematic behavior.<sup>133</sup>

Sobriety checkpoints only serve as an obstacle between the motivation to drive drunk and the action of drunk driving. In economic terms, the sobriety checkpoint does nothing to reduce the individual's wants but rather exists to influence rational individuals to choose not to drink and drive. The effectiveness of the sobriety checkpoint, therefore, can only be measured by its ability to dictate rational choice and by the benefits realized from those decisions.

Second, sobriety checkpoints do not deter chronic, much less all, drunk drivers. Labeling one as a "chronic drunk driver" requires a classification of the different types of drunk drivers, a difficult task.<sup>134</sup> Barent F. Landstreet, then Administrator of the Virginia Alcohol Safety Action Program, classified drunk drivers into three broad categories: Level I, "the social drinker";<sup>135</sup> Level II, "the preproblem drinker";<sup>136</sup> and Level III, "the problem drinker or chronic alcoholic."<sup>137</sup> The problem drinker or chronic alcoholic, in particular, "has, to some extent, a positive psychological or physiological addiction to alcohol. He can no longer be dealt with as a rational individual, as far as his drinking is concerned."<sup>138</sup> Assuming alcoholics need to operate motor vehicles,<sup>139</sup> alcoholism prevents the alcoholic from balancing the cost of drunk driving (i.e.,

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133. ROSS, *supra* note 1, at 74.

134. See JACOBS, *supra* note 91, at 53 (concluding that "[a] substantial portion of drunk driving offenses is committed by a minority of heavy drinkers and alcohol abusers" but "[d]etermining the precise amount of drunk driving and the precise *identity* of drunk drivers is not possible" (emphasis added)).

135. BARENT F. LANDSTREET, *THE DRINKING DRIVER* 59-60 (1977).

136. *Id.* at 60.

137. *Id.*

138. *Id.*

139. This is certainly a rebuttable assumption. Surely some alcoholics have access to public transportation or other safe rides. Alcoholics with access to alternative methods of transportation, however, may nevertheless choose to operate a motor vehicle, especially when the alternative method of transportation is less convenient. This Note assumes that, more likely than not, alcoholics and non-alcoholics alike have little or no access to public transportation and need to operate a motor vehicle on occasion.

definite sanctions if apprehended) against the benefit of drunk driving (i.e., travel from point *A* to point *B*). The chronic alcoholic, therefore, is an exception to the theory of rational maximization because the chronic alcoholic is unable to make a rational choice. This does not mean that the economic model is flawed. The theory of rational maximization understands that outliers exist.<sup>140</sup> Sobriety checkpoints thus have little or no deterrent value with respect to the chronic drunk driver.<sup>141</sup> On the other hand, sobriety checkpoints retain value as a method to apprehend chronic drunk drivers so long as the chronic drunk driver encounters the sobriety checkpoint.

Third, sobriety checkpoints tend to have a short-term deterrent impact on social drinkers. Australia's experience with its Random Breath Testing (RBT) program is instructive on this point. Ross Homel, an Australian psychologist, studied and described the general procedures of the RBT program as follows:

[It] enables police to administer a screening breath test even when they have no reason to believe that the driver has been drinking. . . . RBT always involves arbitrarily selected checkpoints, usually on main roads, which are varied from day to day and from week to week and are not announced publicly prior to the RBT operation. . . . [I]n practice RBT is concentrated in the evening hours, especially on weekends . . . . Motorists passing a checkpoint are pulled over for a breath test in a more or less haphazard manner, and in principle any driver of a car, motorcycle, or truck can be asked to take a test, regardless of age, sex, or manner of driving.<sup>142</sup>

Further, "[n]o judgment is made by the police as to the likelihood that the driver has been drinking"<sup>143</sup> and "[t]he test is given to all drivers stopped."<sup>144</sup>

The procedure of the RBT program differs from the sobriety checkpoint in *Sitz* so much so that American courts would surely rule their operation unconstitutional upon a Fourth Amendment challenge.<sup>145</sup> For example, the RBT program subjects motorists to a mandatory breath test. American officers, on the other hand, generally cannot administer breath tests at sobriety checkpoints without reasonable suspicion to administer the

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140. See, e.g., BARNES & STOUT, *supra* note 78, at 4 ("Economists do not believe that everyone always acts rationally. People sometimes behave in an apparently self-destructive fashion.")

141. Cf. HOMEL, *supra* note 117, at 225–26 (describing "dedicated drinking drivers" and noting the ineffectiveness of heavy penalties to deter their behavior).

142. *Id.* at 105 (emphasis added).

143. ROSS, *supra* note 1, at 69.

144. *Id.*

145. *Id.* at 71.

test.<sup>146</sup> The RBT program does not provide the public with advance publicity of its operation. In America, a number of states will consider advance publicity as a factor, among other things, to determine constitutional reasonableness.<sup>147</sup> The objective of the RBT program, however, is comparable to the American sobriety checkpoint: to detain individuals without individualized suspicion for a brief period of time to detect and deter drunk driving.<sup>148</sup> Because Australia has greater power to detect and deter drunk driving,<sup>149</sup> a review of the Australian program is more than instructive if it *fails* or is *deficient* in achieving its goal. To that end, Homel noted a "marked decline in fatal crashes coinciding with the inauguration of RBT," indicating significant initial success.<sup>150</sup> The monthly mean of fatal crashes prior to the inauguration of RBT was 95.7 persons; the mean for the forty-eight months after was 76.0 persons, reflecting a 20.6% decline.<sup>151</sup> Homel, however, further observed a "steady upward movement in the fatal crash statistics" after the post-inauguration low.<sup>152</sup> The upward movement is consistent with the theory of deterrence as an unstable process.<sup>153</sup> That is, "deterrence appears to be an unstable process at the individual level, with peer pressure, lack of exposure to RBT, and successful drink-driving episodes operating to erode perceptions and

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146. See, e.g., *People v. Pecora*, 473 N.Y.S.2d 320, 322 (N.Y. Town Ct. 1984) (concluding that the police officer had no reasonable suspicion to ask the defendant to submit to a breath test). The court stated, "[M]ere speeding does not automatically create a suspicion that a driver has been driving while intoxicated. . . . [T]he officer articulated no other indicia of Defendant's intoxication. There was no evidence of any combination [of] slurred speech; alcohol on the breath; labored walking; watery eyes, etc." *Id.*

147. Compare *People v. Banks*, 863 P.2d 769, 782 (Cal. 1993) ("[W]e conclude that the operation of a sobriety checkpoint conducted in the absence of advance publicity, but otherwise in conformance with [established guidelines] . . . , does not result in an unreasonable seizure within the meaning of the Fourth Amendment to the United States Constitution."), with *State v. Blackburn*, 63 Ohio Misc. 2d 211, 215 (Clark County Mun. Ct. 1993) (concluding that the sobriety checkpoint was unreasonable under the Fourth Amendment to the United States Constitution when "the state did not establish that any guidelines for site selection and *publicity* were established and followed, or that the seizures were sufficiently time limited" (emphasis added)).

148. Compare *supra* note 142 and accompanying text (describing the RBT program), with *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447-48 (1990) (describing the sobriety checkpoint at issue).

149. See ROSS, *supra* note 1, at 71 (describing American checkpoint programs as "restrained, even timid" as compared to Australian RBT programs).

150. HOMEL, *supra* note 117, at 119.

151. *Id.*

152. *Id.* at 119-22.

153. *Id.* at 244-45.

behavior patterns built up through earlier exposure to RBT."<sup>154</sup> Sobriety checkpoints, as a deterrent, likewise exhibit diminishing value over time.<sup>155</sup>

Fourth, sobriety checkpoints require significant publicity and visibility for continued deterrence. Significant publicity and visibility counter the factors that erode the deterrent value of sobriety checkpoints over time.<sup>156</sup> Publicity and visibility remind motorists of the costs of deciding to drink and drive, thereby maintaining high levels of perceived risk of apprehension. The RBT programs in Australia, for example, required millions of dollars of public resources.<sup>157</sup> The RBT program's publicity even had a "catchy tune . . . [to] ensure[] not only that the message got across but that it was remembered."<sup>158</sup> The United States likewise recognizes the value of highly visible sobriety checkpoints, as evidenced in NHTSA reports.<sup>159</sup> The language of federal law—found in SAFETEA-LU—emphasizes the preference for high visibility enforcement programs too.<sup>160</sup>

Lastly, highly visible and publicized enforcement programs, if maintained, may result in permanent behavioral changes. Even though the Australian experience witnessed a post-RBT inauguration increase in the fatality rate, Ross nevertheless commented in 1992 that RBT "was associated with a significant and apparently permanent decline in alcohol-related crash fatalities."<sup>161</sup> Ross further contends that "deterrent policies may eventually affect related social

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154. ROSS, *supra* note 1, at 70–71 (citations and quotations omitted); *see also* HOMEL, *supra* note 117, at 245 ("If RBT is to have a sustained impact on the road toll, the number of people being reminded of the operation of RBT must exceed the number lost through . . . peer pressure, lack of exposure to RBT, or successful drink-drive episodes.").

155. *See, e.g.*, ROSS, *supra* note 1, at 71 (noting the short-lived success of checkpoint programs enforced in Arizona).

156. *See supra* note 154 and accompanying text (noting the "unstable process").

157. *See* HOMEL, *supra* note 117, at 115 ("More than \$1 million was spent on television, radio, and print advertising over Christmas 1982 and Easter 1983. Since then, many more millions have been expended."); *see also* *Random Breath Testing Commercial [1983]*, <http://www.youtube.com/watch?v=6jLHGDYiT64> (last visited Mar. 22, 2010) (displaying a random breath testing commercial advertised in Australia during the 1980s) (transcript on file with the Washington and Lee Law Review).

158. HOMEL, *supra* note 117, at 115.

159. *See, e.g.*, Stuster, *supra* note 5, at 2 (reporting on eight enforcement programs that "share the objective of reducing the incidence of traffic crashes in which alcohol is a factor and the strategy of conducting *highly visible, sustained* enforcement activities" (emphasis added)).

160. *See* SAFETEA-LU § 2007(b)(3), 23 U.S.C. § 410(c)(1) (2006) (providing federal grants for states that "conduct a series of *high visibility*, statewide law enforcement campaigns" (emphasis added)).

161. H. Laurence Ross, *The Law and Drunk Driving*, 26 LAW AND SOC'Y REV. 219, 222 (1992); *see also* ROSS, *supra* note 1, at 185 ("The Australian experience suggests that if police activity is maintained, permanent reductions in drunk driving may occur.").

norms, countering the incentives people have to drink and drive with external sanctions of shame and internal one of guilt . . . ."162 Ross may be correct because Australia continues to conduct RBT programs with an overwhelming 98% approval rating from Australian citizens.<sup>163</sup> But it is important to remember the inherent problems with comparing Australia's RBT programs to American sobriety checkpoints. Homel provides insight on this point:

Nothing in the Australian literature encourages the belief that roadblocks or sobriety checkpoints, without the use of full random breath testing, are capable of delivering a substantial and sustained reduction in alcohol-related casualty crashes. In this respect, the Australian literature is consistent with what is known of the effects of sobriety checkpoints in North America. *In addition, however, the Australian literature suggests equally as strongly that full random testing is also not capable of achieving long-term reductions in casualties unless it is rigorously enforced and extensively advertised.*<sup>164</sup>

American sobriety checkpoints cannot use full random breath testing under current law.<sup>165</sup> Nothing suggests that American sobriety checkpoints are capable of producing permanent reductions in drunk driving even if the sobriety checkpoints are rigorously enforced and extensively advertised. Factors other than deterrent policies may also contribute to permanent reductions of alcohol-related fatalities.<sup>166</sup> For example, grass-roots organizations like MADD may be more accountable for changes in drunk driving behavior than sobriety checkpoints alone. Accordingly, whether sobriety checkpoints in America affect social norms in the long run remains an unknown possibility.

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162. Ross, *supra* note 1, at 3.

163. See Darren Pennay, *Community Attitudes to Road Safety: 2008 Survey Report*, DEP'T OF INFRASTRUCTURE, TRANSPORT, REG'L DEV. AND LOCAL GOV'T (Austl.) 10 (2008), available at [http://www.infrastructure.gov.au/roads/safety/publications/2008/pdf/comm\\_att\\_08.pdf](http://www.infrastructure.gov.au/roads/safety/publications/2008/pdf/comm_att_08.pdf) (reporting that 98% of respondents are in total agreement with the policy of random breath testing of drivers). The report also notes that "[o]verall agreement has not fallen below 96% since 1997." *Id.*

164. Ross Homel, *Random Breath Testing and Random Stopping Programs in Australia*, in *DRINKING AND DRIVING: ADVANCES IN RESEARCH AND PREVENTION* 159, 192 (R. Jean Wilson & Robert E. Mann eds., 1990) (emphasis in original and citations omitted).

165. See *supra* notes 145–147 and accompanying text (noting the differences between Australian RBT programs and American sobriety checkpoints, and concluding that the RBT program could not withstand a Fourth Amendment challenge if used in the United States).

166. See, e.g., ROSS, *supra* note 1, at 140, 140–66 (addressing different factors that may "reduc[e] injury and sav[e] lives notwithstanding the continued existence of impaired driving," including the improvement of traffic patterns, automobile safety technology, life-saving medical technology, and the elimination of roadside hazards).

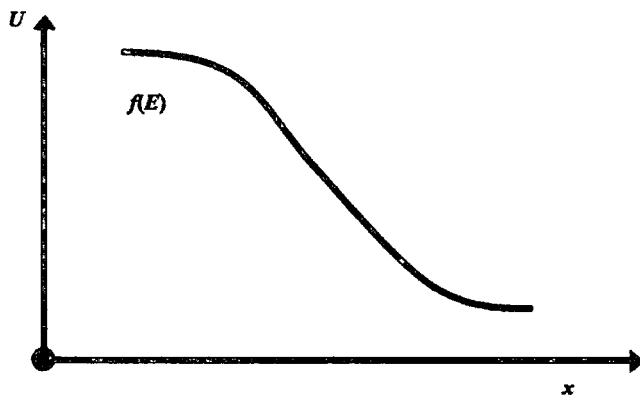


## 2. Interpreting the Observations

Remember, the effectiveness of the sobriety checkpoint is a function of its ability to deter motorists from drinking and driving. The ability to deter motorists from drinking and driving, in turn, is a function of motorists' perceived risks of apprehension—the greater the ability of the sobriety checkpoint to increase perceived risk of apprehension, the greater the utility of the sobriety checkpoint.

Part III.B.1 noted general limitations of sobriety checkpoint utility from empirical evidence: Sobriety checkpoints have virtually no deterrent value to the chronic drunk driver, suggesting a utility "ceiling" for effectiveness. Sobriety checkpoints exhibit great short-term deterrent value. Absent aggressive publicity and visibility, the deterrent value of the sobriety checkpoint diminishes over time because external factors—e.g., peer pressure and successful drunk driving episodes—erode the perceived risk of apprehension of individual motorists. Sobriety checkpoints may influence social behavior, suggesting a utility "floor" for effectiveness. The utility floor is also supported, at the very least, by the visible apprehension of undeterred chronic drunk drivers.

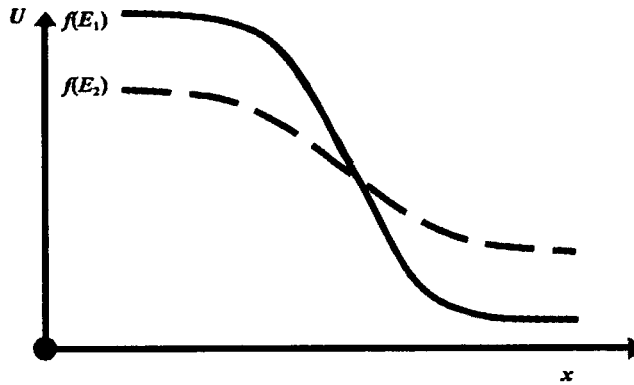
Consistent with these observations, one could hypothesize a trend of sobriety checkpoint effectiveness ( $E$ ), in terms of utility value ( $U$ ), over time ( $x$ ):



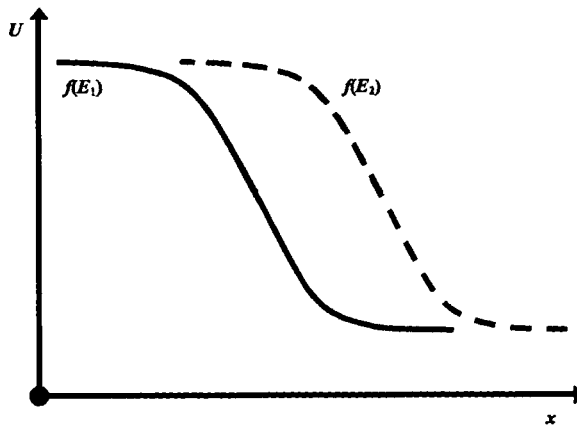
The trend illustrates the utility function of sobriety checkpoints over time ( $x$ ), with all other variables constant and greater than zero, as follows:

$$f(E) = -\left(\alpha \times \sqrt[3]{(x - \beta)}\right) + \mu$$

Alpha ( $\alpha$ ) represents the relationship that chronic drunk drivers have with the utility function of sobriety checkpoints such that, as the number of chronic drunk drivers increases, alpha ( $\alpha$ ) decreases. A relatively lower alpha ( $\alpha$ ) represents a lower utility ceiling and a higher utility floor. For example, assume scenario one has less chronic drunk drivers than scenario two ( $\alpha_1 > \alpha_2$ ). Scenarios one and two are represented as follows:

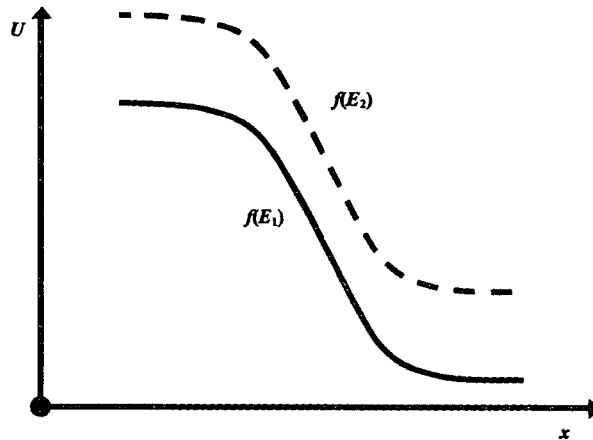


Beta ( $\beta$ ) measures the duration of the impact of the sobriety checkpoint such that a high beta ( $\beta$ ) illustrates a more lasting deterrent effect of the checkpoint. For example, assume that in scenario one the sobriety checkpoint's deterrent effect diminishes earlier than in scenario two ( $\beta_1 < \beta_2$ ). Scenarios one and two are represented as follows:



Mu ( $\mu$ ) represents the extent to which the sobriety checkpoint may permanently affect behavioral changes such that, as the sobriety checkpoint

positively affects behavioral change as a deterrent,  $\mu$  ( $\mu$ ) increases. A relatively high  $\mu$  ( $\mu$ ) represents a greater shift in behavioral change. For example, assume that in scenario two the sobriety checkpoint has a greater impact on behavioral change than scenario one ( $\mu_1 < \mu_2$ ). Scenarios one and two are represented as follows:



This Note does not present these graphs as absolute truths regarding the effectiveness of sobriety checkpoints. Rather, this Note presents the graphs to illustrate, roughly, empirical observations and the theoretical effects different variables may have on the effectiveness of the sobriety checkpoint. With a working theoretical representation of the extent to which the sobriety checkpoint advances the government interest in deterring drunk driving, this Note turns to the degree of intrusion the sobriety checkpoint inflicts upon motorists.

### C. The Degree of Intrusion upon Motorists

#### 1. Empirical Observations

Motorists have intangible, albeit limited, liberty interests guaranteed by the right to be free from unreasonable searches and seizures.<sup>167</sup> The initial stop and

167. See, e.g., *United States v. Ortiz*, 422 U.S. 891, 895 (1975) ("[T]he central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials."); *Florida v. Jimeno*, 500 U.S. 248, 253 (1991) (Marshall, J., dissenting) ("[A]n individual has but a limited expectation of privacy in the interior of his car. . . . [I]ts passengers and contents are generally exposed to public view. . . . [C]ars 'are subjected to pervasive and continuing governmental regulation and controls,' and may be seized

subsequent questioning conducted pursuant to a sobriety checkpoint is a "seizure" within the meaning of the Fourth Amendment.<sup>168</sup> Motorists, then, lose utility value in their liberty interest when the government implements an enforcement program that stops motorists without individualized reasonable suspicion.<sup>169</sup> But valuing liberty interest, much less liberty interest lost, is extremely difficult.<sup>170</sup> The Court in *Sitz* nevertheless expressed the value of liberty interest in terms of "objective" and "subjective" intrusions (or costs) when determining the reasonableness of checkpoint stops.<sup>171</sup> This Note will discuss each in turn.

Courts value objective cost by the degree of procedural safeguards at the checkpoint—the higher the degree of procedural safeguards, the lower the degree of objective intrusion upon motorists.<sup>172</sup> The common denominator of most procedural safeguards is the extent of police discretion.<sup>173</sup> That is, a stop without individualized suspicion is more likely to be unconstitutional when the checkpoint officer exercises an unreasonable amount of discretion.<sup>174</sup> The level of police discretion to render the *suspicionless* stop unconstitutional is exceedingly minimal.<sup>175</sup>

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by the police when necessary to protect public safety . . . ." (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976))).

168. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) ("[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint.").

169. See *id.* (turning to the issue of Fourth Amendment reasonableness after noting the checkpoint stop to be a "seizure" within the meaning of the Fourth Amendment).

170. Cf. Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021, 1052 n.134 (2004) ("Cost-benefit analysis could, for example, illustrate the extent to which homeland security regulations constrain civil liberties. *Although quantifying civil liberties is difficult*, cost-benefit analysis could provide valuable insights in this area." (emphasis added)).

171. See, e.g., *Sitz*, 496 U.S. at 451–53 (describing and evaluating "objective" and "subjective" intrusion).

172. See, e.g., *id.* at 452 (agreeing with the Michigan Court of Appeals's application of "the 'objective' intrusion, [as] measured by the duration of the seizure and the intensity of the investigation").

173. See R. Marc Kantrowitz, Annotation, *Validity of Police Roadblocks or Checkpoints for Purpose of Discovery of Alcoholic Intoxication—Post-Sitz Cases*, 74 A.L.R.5th 319, § 2(a), at 332–33 (1999) ("The critical factor considered by courts in almost every jurisdiction where sobriety checkpoints are permissible concerns the amount of discretion exercised by police officers in the field . . .").

174. See *id.* at 333 ("If police officers in the field exercise an excessive amount of discretion, the roadblock will usually be held to have been constitutionally deficient."); see also *People v. Bigger*, 771 N.Y.S.2d 826, 830 (N.Y. Just. Ct. 2004) ("The *sine qua non* of a non-arbitrary procedure for operating a sobriety checkpoint is to eliminate the discretion of the officers operating that checkpoint as to which cars to stop.").

175. See, e.g., *Campbell v. State*, 679 So.2d 1168, 1170 (Fla. 1996) (finding that written

Procedures, then, must adequately limit police discretion to justify an otherwise unreasonable seizure.<sup>176</sup> An objective and neutral guideline for checkpoint officers to follow is obvious, and often necessary, to limit police discretion.<sup>177</sup> Courts often insist that upper echelon personnel of the police agency design these guidelines.<sup>178</sup> Neutral guidelines detail the sequence in which officers stop cars.<sup>179</sup> For example, courts favor checkpoint guidelines that stop every, or every *n*th, approaching car.<sup>180</sup> Guidelines also determine the questions to ask motorists at the checkpoint.<sup>181</sup> Guidelines further limit police

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guidelines fail to limit discretion, and, therefore, do not withstand constitutional challenge, when written guidelines "fail to specify vehicle selection procedures, duty assignments, detention techniques, and procedures for the disposition of vehicles" and, therefore, failed to limit police discretion").

176. See, e.g., *State v. Duarte*, 149 P.3d 1027, 1038 (N.M. Ct. App. 2006) ("The elimination of the requirement for individualized suspicion creates the serious concern about lack of uniformity and need for limitation of discretion.").

177. See, e.g., *United States v. Huguenin*, 154 F.3d 547, 559 (6th Cir. 1998) ("[I]n *Sitz*, the Supreme Court emphasized the importance of having proper guidelines to effectuate that purpose of detecting and deterring intoxicated drivers without undue police discretion."). The Sixth Circuit contrasted the objective guidelines accepted by the Supreme Court in *Sitz* with the guidelines at issue in *Huguenin*. *Id.* at 559–60. For example, a *Huguenin* checkpoint stop lasted for at least several minutes, whereas the *Sitz* checkpoint stop lasted for less than a minute. *Id.* at 560. Further, "defendants were subjected to questioning involving more than a few brief queries necessary to effectuate the alleged purpose of the checkpoint [to deter drunk driving], and the scope of the questioning was not 'aimed solely at ascertaining' [intoxication]." *Id.* (quoting *Maxwell v. City of N.Y.*, 102 F.3d 664, 667 (2d Cir. 1996)). The Sixth Circuit concluded, "[W]e find the objective intrusion into defendants' privacy was not limited by appropriate operating procedures, but was unnecessarily high due to the lack of limitation on the officers' discretion." *Id.* (emphasis added).

178. See, e.g., *Thomas v. State*, 625 S.E.2d 455, 457 (Ga. Ct. App. 2005) ("As a safeguard on roadblock practices, courts in Georgia have required that roadblocks be implemented by 'supervisory personnel rather than the officers in the field.' Elevating the roadblock decision from the officers in the field to the supervisory level limits the exercise of discretion by the officers in the field." (quoting *LaFontaine v. State*, 497 S.E.2d 367, 369 (Ga. 1998))).

179. See, e.g., *City of Las Cruces v. Betancourt*, 735 P.2d 1161, 1164–65 (N.M. Ct. App. 1987) (listing eight factors courts must consider to determine checkpoint reasonableness, including restrictions on officer discretion to stop motor vehicles). After *Sitz*, the New Mexico Court of Appeals clarified, "The eight [*Betancourt*] factors impose additional and stricter guidelines than the balancing test used by the United States Supreme Court in *Sitz*." *State v. Madalena*, 908 P.2d 756, 762 (N.M. Ct. App. 1995). The court further stated, "[W]e hold that a sobriety checkpoint conducted in substantial compliance with the eight *Betancourt* factors is constitutional under the New Mexico Constitution." *Id.*

180. See, e.g., *Betancourt*, 735 P.2d at 1165 ("Automobiles should not be stopped randomly. It would be proper to stop every automobile. Alternatively, the procedural plan may properly include a mathematical selection formula, stopping, for example, every third automobile.").

181. See, e.g., *State v. Duarte*, 149 P.3d 1027, 1039 (N.M. Ct. App. 2006) (allowing some officer deviation from the script and "declin[ing] to fix a deviation from a script of questions as

discretion by regulating how long the officer may detain individual motorists.<sup>182</sup>

Courts will consider other objective procedural safeguards that do little to limit police discretion, including whether the roadblock accounted for, and carried out, appropriate safety conditions.<sup>183</sup> Whether the government publicized the checkpoint program in advance is yet another consideration.<sup>184</sup>

Courts measure subjective intrusion, on the other hand, by the interference with motorists' freedom of movement and the resultant inconveniences, including time wasted and "the generating of concern or even fright on the part of lawful travelers."<sup>185</sup> Many of the objective considerations work to limit subjective intrusion. For example, when courts disfavor extended checkpoint detentions, courts protect individual motorists' subjective value of time. Furthermore, the judicial emphasis on safe conditions and advance publicity as considerations for constitutional reasonableness limits the element of surprise that the checkpoint has on individual motorists.<sup>186</sup>

The Court has also defined subjective intrusion by the nature of the stop. In *Sitz*, for example, the Court noted its previous distinction of the subjective intrusion upon motorists at a checkpoint stop from that of a roving patrol stop:

[T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles

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a constitutional infirmity, without contemporaneous inquiry more broadly into the invasiveness and intrusion of the contact"). The court later clarified its position: "Close questions as to when the threshold of minimal discretion at DWI roadblocks is reached should be resolved in favor of privacy, not a broadening of discretion." *Id.*

182. See, e.g., *State v. Blackburn*, 63 Ohio Misc. 2d 211, 215 (Clark County Mun. Ct. 1993) (disfavoring a two or five minute stop as opposed to a twenty-five second *Sitz* stop).

183. See, e.g., *Madelina*, 908 P.2d at 763 (noting that "orange pylons, special stop signs and room for a safe-stopping distance before entering the checkpoint area, as well as six police cars with their lights flashing and a Batmobile to make the roadblock visible" were sufficient safety conditions to help render the checkpoint reasonable).

184. See, e.g., *State v. Barker*, 850 P.2d 885, 891 (Kan. 1993) (upholding the validity of the checkpoint even though "[t]here was no notice to the public at large" and noting that "[w]hile this [advance notice] is a valid and desirable requirement, its absence does not by itself vitiate the checklane [checkpoint]").

185. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976)).

186. *Id.* at 453 ("At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.") (quoting *Martinez-Fuerte*, 428 U.S. at 558)).

are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.<sup>187</sup>

The Court, therefore, justified its conclusion on subjective intrusiveness in part by comparing the sobriety checkpoint stop with a roving patrol stop.

Judicial review is limited to the aforementioned considerations. But judicial review leaves want for a more searching empirical analysis of public opinion. *Sitz* itself demonstrates how a lack of empirical understanding of subjective intrusion results in a difference of opinion—with the majority holding the subjective intrusion of a sobriety checkpoint "slight"<sup>188</sup> over the dissenting justices' objections that the majority "undervalues the citizen's interest in freedom from random, unannounced investigatory seizures."<sup>189</sup> Recent scholarship may indicate that the majority was indeed incorrect to undervalue the citizen's interest in freedom from random, unannounced investigatory seizures. Whether the *Sitz* undervaluation should have affected the ultimate outcome, however, is still unclear.

In 1993, Professors Christopher Slobogin and Joseph E. Schumacher undertook an empirical analysis of judicially determined reasonable expectations of privacy.<sup>190</sup> Professors Slobogin and Schumacher surveyed 217 individuals.<sup>191</sup> The study provided each individual with "fifty different search and seizure scenarios derived primarily from Supreme Court or lower court cases."<sup>192</sup> When asked "to rate, on a scale of 0 to 100, the extent to which they considered each method [or scenario] 'an invasion of privacy or autonomy,' with 0 representing 'Not At All Intrusive' and 100 representing 'Extremely Intrusive,'"<sup>193</sup> the respondents provided a mean intrusiveness rating of 46.41 for "[s]topping drivers at [a] roadblock for 30-second questioning at night."<sup>194</sup> A different invasion of privacy also lacking individualized suspicion—" [g]oing through [a] magnetometer at airport"—yielded an intrusiveness mean rating of

187. *Id.* (quoting *Martinez-Fuerte*, 428 U.S. at 558); see also *supra* notes 8–11 and accompanying text (distinguishing sobriety checkpoint stops from roving patrol stops).

188. See *Sitz*, 496 U.S. at 451 ("[T]he weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight.").

189. *Id.* at 462 (Stevens, J., dissenting).

190. See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 728 (1993) ("This Article reports an attempt to investigate empirically important aspects of the Fourth Amendment to the United States Constitution, as construed by the United States Supreme Court.").

191. *Id.* at 732.

192. *Id.* at 735.

193. *Id.* at 736.

194. *Id.* at 738.

13.47.<sup>195</sup> Roadblock stops at night, at least when compared to airport screens, are seemingly not as "slight" as *Sitz* will have one believe. That is, on a sliding scale of reasonable suspicion required to conduct the seizure, a mean reasonable expectation of privacy rating of 46.41 out of 100 suggests that *some* degree of individualized suspicion is required.<sup>196</sup>

Nighttime roadblock stops, however, ranked relatively low on the intrusiveness scale when compared to the other forty-nine scenarios. Nighttime roadblocks ranked fourteenth out of fifty, from least intrusive to most intrusive.<sup>197</sup> Professors Slobogin and Schumacher, observing this relationship, noted that being stopped at a nighttime roadblock is "in rough congruence with Court decisions [*Sitz*]."<sup>198</sup> An accurate valuation of the degree of subjective intrusion, therefore, is at best unclear.

One could hypothesize, however, that subjective cost has an inverse relationship with the effectiveness of the sobriety checkpoint. In other words, when the sobriety checkpoint demonstrates the ability to deter drunk driving through high perceptions of risk of apprehension, motorists then support the program. Likewise, when the sobriety checkpoint *fails* to sustain adequate perceptions of apprehension, motorists then lose faith in the program and become annoyed with it.

The Australian experience with RBT is again instructive on this point. In June of 1986, Australian drivers were asked whether they agreed with the random breath testing of drivers for alcohol content.<sup>199</sup> Respondents could have answered in one of three ways: "[a]gree with random breath tests," "[d]isagree with random breath tests," and "[d]on't know/[c]an't say."<sup>200</sup>

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195. *Id.*

196. *Id.* at 757–58 (discussing the "proportionality principle"). Professors Slobogin and Schumacher articulate the proportionality principle as follows:

[U]nder the proportionality principle, intrusiveness should normally be the sole criterion in deciding the substantive issue of how certain we must be that a search or seizure will be successful before it is allowed: in this context, the level of "probable cause" the *ex ante* reviewer must find . . . should be roughly proportional to the level of intrusiveness associated with the proposed search or seizure.

*Id.* at 757.

197. *Id.* at 738. The least intrusive scenario was "[l]ooking in foliage in [a] public park." *Id.* The most intrusive was, not surprisingly, a "[b]ody cavity search at [the] border." *Id.* at 739.

198. *Id.* at 740.

199. See Touche Ross Services Pty, *Survey of Community Attitudes: FORS Road Safety Research Project*, FED. OFFICE OF ROAD SAFETY, DEP'T OF TRANSP. (Austl.) 33–34 (1986), available at [http://www.infrastructure.gov.au/roads/safety/publications/1986/pdf/comm\\_att\\_1.pdf](http://www.infrastructure.gov.au/roads/safety/publications/1986/pdf/comm_att_1.pdf) (reporting on attitudes toward drinking and driving issues, namely RBT).

200. *Id.* at 34.



Eighty-eight percent of drivers agreed with random breath testing.<sup>201</sup> When asked whether breath testing for blood alcohol should be taken only for drivers who seem drunk or whether breath testing is favorable for all drivers, however, 76% of drivers supported random breath tests for all drivers.<sup>202</sup> The drop in support caused the surveyors to note the possibility of "a real preference for target testing."<sup>203</sup> Put differently, the responses indicated a preference for individualized suspicion before subjecting drivers to breath testing.

Fast-forward to April and May of 2008. Australians were posed the same question: "Do you agree or do you disagree with the random breath testing of drivers?"<sup>204</sup> This time, however, respondents could have answered in one of five ways: "[a]gree strongly," "[a]gree somewhat," "[d]isagree somewhat," "[d]isagree strongly," and "[d]on't know."<sup>205</sup> Ninety-eight percent of Australians agreed with the random breath testing of drivers, with 85% strongly agreeing and 13% somewhat agreeing.<sup>206</sup> The difference between the 1986 survey and the 2008 survey demonstrated an increase in support for RBT.

If the 1986 respondents would have had the opportunity to "agree somewhat" and "disagree somewhat" like the 2008 respondents, then perhaps the current analysis would be different. But the balance of agreement versus disagreement responses between the surveys is sufficiently similar for the purposes of this Note. The 2008 survey, unfortunately, did not ask respondents whether RBT for blood alcohol should be taken only for drivers who seem drunk or whether RBT is favorable for all drivers. The change in real preference for target testing, therefore, cannot be assessed. Still, the surveys demonstrated an overall increase in support for RBT of all drivers between 1986 and 2008.

Now the issue turns to whether a correlation exists between RBT effectiveness and public support for RBT. Generally, RBT has demonstrated significant short-term, and possibly long-term, effectiveness and a gain in public support over time, suggesting a positive correlation.<sup>207</sup> The positive correlation may find additional support in surveys of RBT visibility. Again, perceptions of risk of apprehension measure the enforcement program's value as a deterrent, and publicity and visibility, in turn, influence perceptions of risk

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201. *Id.*

202. *Id.*

203. *Id.* at 33.

204. Pennay, *supra* note 163, at 10.

205. *Id.*

206. *Id.*

207. *See supra* notes 150–154 and accompanying text (providing numbers and figures relating to the effectiveness of RBT).

of apprehension.<sup>208</sup> If visibility affects public support, then effectiveness and public support of RBT may find a common denominator in visibility.

This hypothesis is consistent with the 2008 survey and with particular consideration to two Australian states: Victoria and Western Australia. The 2008 survey posed the following questions: "Have you seen police conducting random breath testing in the last six months?";<sup>209</sup> if so, "Have you personally been breath tested in the last six months?"<sup>210</sup> Seventy-seven percent of Victorian respondents reported having seen RBT in operation, 37% of whom were personally tested.<sup>211</sup> On the other hand, 64% of Western Australian respondents reported having seen RBT in operation (the lowest of all Australian states and territories), 27% of whom were personally tested.<sup>212</sup> Western Australia, relative to the other Australian states, also showed the least support for RBT in 2008, with 77% of respondents agreeing strongly with RBT.<sup>213</sup> If Western Australians experience the least visible RBT programs in Australia and demonstrate the least public support for RBT, then it is at least not unreasonable to suggest that Western Australians do not support RBT as strongly as other Australians because Western Australians do not perceive RBT as an effective deterrent.

In summary, the degree of police discretion measures the value of objective intrusiveness—the more objective and neutral the guidelines, the less officer discretion, the less objective intrusiveness. Public opinion polls gauge most accurately the level of subjective intrusion a sobriety checkpoint stop imposes on individual motorists. Public opinion polls suggest, albeit inconclusively, that subjective intrusion has an inverse relationship with sobriety checkpoint effectiveness.

## 2. *Interpreting the Observations*

Consistent with the observations in Part III.C.1, one could hypothesize a trend of the degree of intrusion ( $C$ ), in terms of utility value ( $U$ ), over time ( $x$ ), as follows:

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208. See *supra* Part III.A.2 (discussing general deterrence).

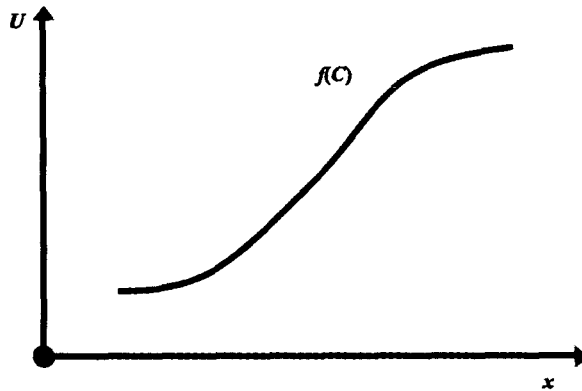
209. Pennay, *supra* note 163, at 15.

210. *Id.*

211. *Id.* at 16.

212. *Id.*

213. *Id.* at 11.



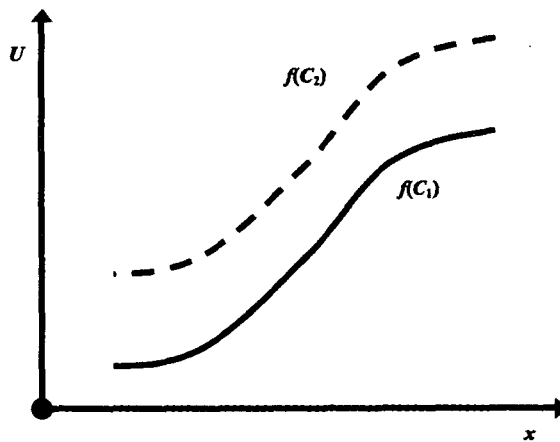
The trend illustrates the utility function of sobriety checkpoints over time ( $x$ ), with all other variables constant and greater than zero, as follows:

$$f(C) = \left( (\alpha \times \sqrt[3]{(x - (\beta + \gamma))}) + \mu \right) + \delta$$

Or simply:

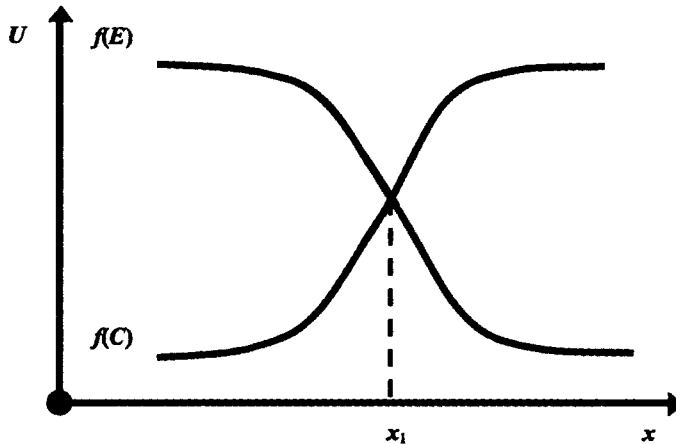
$$f(C) = -(f(E)) + \delta$$

The utility function of social cost— $f(C)$ —adds the variable delta ( $\delta$ ), which represents the degree of police discretion, such that social cost increases when delta ( $\delta$ ) increases. Assume that the sobriety checkpoint in scenario two grants checkpoint officers greater discretion than in scenario one ( $\delta_1 < \delta_2$ ). Scenarios one and two are represented as follows:



*D. A Different Look at Sobriety Checkpoint Balancing*

When one plots the effectiveness utility function from Part III.B.2 and the intrusiveness utility function from Part III.C.2 together, one may observe the following:



Point ( $x_1$ ) is the irrational point. Social benefits outweigh social costs before point ( $x_1$ ). Social costs outweigh social benefits at all points after point ( $x_1$ ). In economic terms, the sobriety checkpoint is then irrational, and certainly unreasonable, at all points after point ( $x_1$ ).

Again, this Note does not offer the graphical illustrations as absolute truths about sobriety checkpoints. Rather, this Note attempts to use economic principles to demonstrate that *Sitz* is not fixed in time. At some point in the future—possibly not today—sobriety checkpoints may require judicial reevaluation.

*IV. A Response to Recent Scholarship*

In *Sitz*, the Court limited its decision to the reasonableness of "only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers."<sup>214</sup> The issue of whether police may nevertheless chase and detain motorists who exhibit the apparent intention to avoid the checkpoint but otherwise do not exhibit any

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214. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450–51 (1990).

articulable traffic infraction remains unanswered by the Court.<sup>215</sup> This Note focuses on how a judicial decision on the latter affects the former. Some states have resolved the latter issue—but they are split.<sup>216</sup> Police departments have responded by issuing checkpoint directives to chase and detain *all* motorists who exhibit the apparent intention to avoid the checkpoint.<sup>217</sup> The understanding is that a nondiscriminatory and neutral directive that authorizes and, more significantly, *requires* the chase and detain stop of motorists will survive Fourth Amendment challenges because the directive limits police discretion.<sup>218</sup> Again, the states are split on the validity of these directives—with courts either finding the chase and detain stop necessary for sobriety checkpoint effectiveness or finding, still, an unconstitutional degree of discretion exercised by chase and detain officers.<sup>219</sup>

The state split invited recent scholarship to propose solutions. One Note in particular, Shan Patel's *Per Se Reasonable Suspicion: Police Authority to Stop Those Who Flee from Road Checkpoints*,<sup>220</sup> calls for a bright-line judicial rule—per se reasonable suspicion—to support police authority to conduct chase

215. A chase and detain stop is comparable to a roving patrol stop discussed earlier in this Note because, generally, both stops require individualized reasonable suspicion.

216. *Compare* State v. Foreman, 527 S.E.2d 921, 924 (N.C. 2000) ("The purpose of any checkpoint . . . would be defeated if drivers had the option to 'legally avoid,' ignore or circumvent the checkpoint by either electing to drive through without stopping or by turning away upon entering the checkpoint's perimeters."), *with* Commonwealth v. Scavello, 734 A.2d 386, 388 (Pa. 1999) ("Although there is statutory authority . . . for police to conduct roadblocks, and although this court to date has declined to rule this practice unconstitutional, . . . there is no requirement that a driver go through a roadblock. Failing to go through the roadblock . . . provides no basis for police intervention.").

217. *See, e.g.,* State v. Anaya, 185 P.3d 1096, 1098 (N.M. Ct. App. 2008), *rev'd*, 217 P.3d 586 (N.M. 2008) (reviewing a checkpoint directive providing that "vehicles exhibiting an apparent intention to avoid the checkpoint[] shall be deemed to have generated reasonable suspicion to be stopped"). The Florida Highway Patrol, however, expressly denied its officers the authority to stop driver's who attempt to avoid a checkpoint. *See* FLA. HIGHWAY PATROL, COMPREHENSIVE ROADSIDE SAFETY CHECKPOINTS, POLICY NO. 17.08, at 4 (Sept. 1, 1996), *available at* <http://www.fhp.state.fl.us/html/Manuals/fh17-08.pdf> ("A driver's effort to avoid a checkpoint is not sufficient to justify the stopping of a vehicle. Probable cause or reasonable suspicion of criminal activity or other traffic related violations must occur in order to warrant the stopping of a vehicle.").

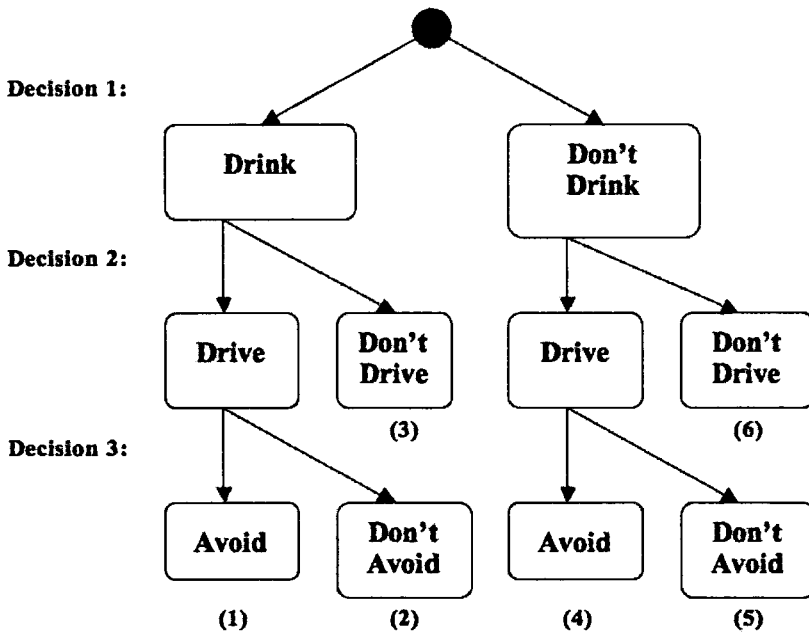
218. *See, e.g.,* Anaya, 185 P.3d at 1098 ("The district court concluded that because 'the plan directs stopping anyone avoiding the checkpoint, it removes the officer discretion that is problematic with sobriety checkpoints.'").

219. *Compare id.* (invalidating a checkpoint directive providing that "vehicles exhibiting an apparent intention to avoid the checkpoint[] shall be deemed to have generated reasonable suspicion to be stopped"), *with* People v. Chaffee, 590 N.Y.S.2d 625, 627 (N.Y. App. Div. 1992) (concluding that a "nonarbitrary uniform procedure to stop all motorists . . . who reasonably appear to be avoiding the checkpoint" is lawful).

220. Patel, *supra* note 20.

and detain stops.<sup>221</sup> The proposed bright-line rule provides "that a vehicle that flees from a roadblock necessarily arouses reasonable suspicion."<sup>222</sup> Patel justifies *per se* reasonable suspicion chase and detain stops, in part, by arguing that motorists who successfully avoid checkpoints undermine the effectiveness of checkpoints and increase the subjective intrusiveness experienced by motorists who do not attempt to avoid checkpoints, thereby rendering *Sitz* checkpoint stops unreasonable.<sup>223</sup> The discussions in Parts III.B.1 and III.C.1, however, suggest that this argument is misguided.

Before responding to Patel's argument, consider the outcomes in the following decision tree:



"Decision 1" represents whether one chooses to drink. "Decision 2" represents whether one chooses to drive. "Decision 3" represents whether one chooses to avoid the checkpoint. The three decisions result in six possible outcomes with

221. *See id.* at 1621 ("This Note . . . argues that the Supreme Court should adopt a bright-line rule that allows police to stop vehicles that attempt to evade checkpoints.").

222. *Id.* at 1642. The bright-line rule may not be so bright. *See id.* at 1633 (noting that "it is nearly impossible to prove conclusively that someone intended to avoid the police unless that person confesses"). This Note, however, looks beyond the separate issue of how checkpoint officers determine whether an individual is in fact fleeing the checkpoint.

223. *See id.* at 1643 ("Allowing individuals to evade checkpoints both undermines the effectiveness of the checkpoints and increases the discretion of law enforcement officials.").

six ultimate utility valuations. Individuals may choose one of the following options: (1) drink, drive, and avoid; (2) drink, drive, and not avoid; (3) drink and not drive; (4) not drink, drive, and avoid; (5) not drink, drive, not avoid; and (6) neither drink nor drive. Each option has a utility value, respectively:  $U_1$ ,  $U_2$ ,  $U_3$ ,  $U_4$ ,  $U_5$ , and  $U_6$ . With the decision tree in mind, this Note now responds, in turn, to Patel's argument that motorists who avoid checkpoints (i) undermine the effectiveness of the checkpoint and (ii) increase the subjective intrusiveness experienced by motorists who do not evade checkpoints.<sup>224</sup>

First, allowing motorists to conduct otherwise lawful maneuvers does not significantly undermine the primary objective of the sobriety checkpoint—general deterrence.<sup>225</sup> Recall that sobriety checkpoints do not affect the decision over whether one chooses to drink.<sup>226</sup> Sobriety checkpoints, then, do not influence rational decision-making at the "Decision 1" level. Recall further that sobriety checkpoint effectiveness is measured by its ability to influence a rational individual not to drive after she chooses to drink; sobriety checkpoints aim to maximize the utility value of option (3)— $U_3$ .<sup>227</sup> Thus, when individuals reach "Decision 3" after choosing to drink and drive, *the sobriety checkpoint has already failed* regardless of whether the motorist chooses option (1) or (2). The per se reasonable suspicion standard does not remedy that failure.

The issue turns to whether the availability of option (1) affects the utility value of option (3). Are motorists more likely to drink and drive upon observing that a checkpoint officer may not stop the motorist for attempting to avoid the checkpoint? Assume that the highest state court has ruled, "A driver's effort to avoid a checkpoint is not sufficient to justify the stopping of a vehicle."<sup>228</sup> To that end, Patel argues, "At the sight of a checkpoint, the most rational decision for intoxicated drivers . . . would be to turn around and flee. . . . [T]he checkpoints would only process law-abiding citizens, and the 0.12 to 1.5 percent of individuals screened at checkpoints who are usually arrested would fall to zero."<sup>229</sup> Patel assumes that option (2) is the least desirable option. In other words, an individual will always choose option (1) over (2) given only those two options because:

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224. *Id.*

225. *See supra* Part III.A.2 (discussing the sobriety checkpoint as a general deterrent).

226. *See supra* note 133 and accompanying text (noting that the sobriety checkpoint does not influence one's underlying motivation to drink).

227. *See supra* Part III.B.1 (discussing the sobriety checkpoint's effectiveness as a general deterrent).

228. FLA. HIGHWAY PATROL, *supra* note 217, at 4.

229. Patel, *supra* note 20, at 1643–44.

$$U_1 > U_2$$

An individual must likewise choose option (3) over (2) given only those two options because:

$$U_3 > U_2$$

An impaired individual, then, must value option (1) more than option (3) for option (1) to have an adverse effect on the value of option (3). The availability of the option to avoid the checkpoint, therefore, affects one's decision not to drive only to the extent that:

$$U_1 > U_3$$

Now assume that the highest state court overruled its previous decision and adopted a per se reasonable suspicion rule. Theoretically then, indiscriminate per se reasonable suspicion reduces the utility value of outcome (1) to equal the utility value of outcome (2) because impaired drivers cannot avoid police confrontation under outcomes (1) and (2). Put differently:

$$U_1 = U_2$$

The most rational decision, therefore, is outcome (3) if one decides to drink because:  $U_3 > U_2$ ; and  $U_3 > U_1$ .

Unfortunately, no empirical evidence suggests that motorists are more or less likely to drink and drive upon observing an attempt to avoid the checkpoint. Perhaps the better question to ask is: Assuming for argument's sake that motorists are more likely to drink and drive when they observe that a checkpoint officer cannot stop the motorist for attempting to avoid the checkpoint, does the benefit of a per se reasonable suspicion standard outweigh the cost?

The cost of a per se reasonable suspicion standard is measured by how the standard diminishes the utility of options (4) and (5). Without per se reasonable suspicion, sober drivers may choose between options (4) and (5) freely. In other words, sober drivers have no perceived risk of apprehension under either option—to avoid or not to avoid—because sober drivers violate no drunk driving law. A sober driver's decision to avoid the checkpoint, therefore, depends on other subjective utility calculations.<sup>230</sup> For example, if a sober driver prefers to avoid police confrontation, the rational choice is option (4) over (5) because, with all else considered equal, the utility value of option (4) is

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230. See *supra* note 79 and accompanying text (articulating the theory of man as a rational utility maximizer in all areas of life).



greater than the utility value of option (5). Put differently, a sober driver will avoid the checkpoint when:

$$U_4 > U_5$$

Now suppose that a court adopts a per se reasonable suspicion standard. Per se reasonable suspicion, obviously enough, affects both drunk and sober drivers. The rule eliminates the utility of option (4) for sober drivers who prefer to avoid police confrontation because option (4) results in a chase and detain stop.<sup>231</sup> Sober drivers, then, must choose between chase and detain stops or checkpoint stops when confronted by a checkpoint at "Decision 3." Per se reasonable suspicion, however, not only influences but also *dictates* that decision because, all else considered equal, chase and detain stops are more intrusive than checkpoint stops.<sup>232</sup> Put differently, the sober driver who prefers to avoid police confrontation values a checkpoint stop more than a chase and detain stop, such that:

$$U_4 < U_5$$

Per se reasonable suspicion, therefore, punishes the sober driver who wishes to avoid police confrontation by stripping her of the ability to avoid and rendering her desire irrational.

Patel, however, describes the consequence of choosing option (4) under these circumstances as "a brief, nonthreatening investigatory stop."<sup>233</sup> But recall the similarities of a chase and detain stop and a roving patrol stop: Both stops involve the approach of a police vehicle and greater restriction of movement.<sup>234</sup> Further, *Sitz* reiterated the substantive difference between roving patrol and checkpoint stops:

[T]he circumstances surrounding a checkpoint stop and search are *far less intrusive* than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and *their approach may frighten motorists*. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.<sup>235</sup>

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231. See Patel, *supra* note 20, at 1649 (noting the argument that "per se reasonable suspicion impermissibly prevents a driver from taking any action that looks evasive").

232. See *infra* notes 233–234 and accompanying text (distinguishing the subjective intrusion between a checkpoint stop and a chase and detain stop).

233. Patel, *supra* note 20, at 1649.

234. See *supra* note 11 and accompanying text (drawing the comparison between police stops and fishing).

235. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453 (1990) (emphasis added and

Recall further that a chase and detain officer subjects the sober driver to inquiries regarding sobriety. The checkpoint officer, on the other hand, may not subject the sober driver to sobriety inquiries unless the officer detects any indicia of intoxication, such as slurred speech, watery or blood shot eyes, and lack of coordination. Sober drivers, therefore, comply with checkpoint stops because the consequences of noncompliance outweigh the consequences of compliance.

The rationale behind conducting sobriety checkpoints as an enforcement program does not support the need to redefine rational choice for otherwise innocent individuals. Traditional sobriety checkpoints attempt to *influence*, not *eliminate*, rational choice. For example, the language in federal statutes, executive publications, and sociological reports all emphasize the implementation of highly "publicized" and highly "visible," *but not mandatory*, sobriety checkpoints.<sup>236</sup> When executive publications recommend chase and detain stops, they recommend that officers stop motorists exhibiting erratic behavior, not mere evasiveness.<sup>237</sup> Per se reasonable suspicion, therefore, is inconsistent with that literature.

Lastly, per se reasonable suspicion shifts the focus of the sobriety checkpoint from deterrence to detection, rendering "the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers"<sup>238</sup> at issue in *Sitz* an entirely different creature. The cause of the shift stems from the underlying misconception that, without per se reasonable suspicion, "the essential justification for the checkpoint would no longer exist[] because the checkpoint would no longer serve any legitimate government interest, *given that no one would be caught*."<sup>239</sup> Per se reasonable suspicion, then, offers a remedy. But deterrence, not detection, is the essential justification for the checkpoint, and a declining arrest rate may indicate that the sobriety checkpoint is effective

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quotations omitted).

236. See, e.g., SAFETEA-LU § 2007(b)(3), 23 U.S.C. § 410(c)(1) (2006) (offering federal assistance to states that conduct "a series of *high visibility*, statewide law enforcement campaigns," including sobriety checkpoints (emphasis added)).

237. *The Use of Sobriety Checkpoints for Impaired Driving Enforcement*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUBL'N NO. DOT HS 807 656, at A-3 (1990), available at <http://ntl.bts.gov/lib/5000/5900/5919/checkpt.pdf> ("A motorist who wishes to avoid the checkpoint by legally turning before entering the checkpoint area should be allowed to do so unless a traffic violation(s) is observed or probable cause exists to take other action. The act of avoiding a sobriety checkpoint does not constitute grounds for a stop.").

238. *Sitz*, 496 U.S. at 450–51.

239. Patel, *supra* note 20, at 1644 (emphasis added).

toward its goal.<sup>240</sup> The effect of per se reasonable suspicion results in definite social costs for unobserved, and most likely unobservable, social benefits. Even though the fact that benefits are unobservable does not render the proposal unreasonable, it nevertheless suggests that the proposal is unjustified.

### V. Conclusion

This Note is dissatisfied with the Court's interpretation and application of Fourth Amendment reasonableness in *Sitz* and attempts to provide a better approach, at least within the narrow scope of sobriety checkpoint reasonableness. This Note finds useful the principles of economic theory, supported by empirical evidence, to hypothesize a model and predict the future of sobriety checkpoint reasonableness. The model overcomes deficiencies in traditional judicial analysis—namely, broad deference to politically accountable authorities when evaluating effectiveness and unclear standards when evaluating the degree of subjective intrusion. The model predicts that at some point in time—maybe not today, maybe not tomorrow—social costs will outweigh social benefits. A *Sitz*-type case, therefore, may find itself back before the Court for a second look at the constitutionality of suspicionless stops at sobriety checkpoints. In the unlikely event that the Court adopts this interpretation of Fourth Amendment reasonableness, perhaps the Court will then provide a more justified opinion.

Until the Court revisits the narrow issue of sobriety checkpoint reasonableness, however, the states will remain split over whether checkpoint police may chase and detain motorists who exhibit the apparent intention to avoid the checkpoint but otherwise do not exhibit any articulable traffic infraction. Some courts have found that the apparent intention to avoid a checkpoint does not alone provide officers with reasonable suspicion to stop the avoiding motorist, leading academics to claim that decisions like these undermine the justification for suspicionless *Sitz* stops. This Note questions that claim and finds the benefits of a per se reasonable suspicion standard, at best, unobserved. The cost of a per se reasonable suspicion standard, however, is realized by the liberty interest lost upon implementation of such a standard. For these reasons, courts may best serve aggregate social utility by rejecting a per se reasonable suspicion standard.

One final point: The sobriety checkpoint is a novel approach to general deterrence. Undoubtedly, the judicial approval and executive use of sobriety

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240. *Supra* note 13 and accompanying text.

checkpoints has saved lives. But the benefit in lives saved for a few comes at the cost of a change in lifestyle for many. Courts, in the end, have the duty to balance the competing interests objectively. To execute this duty, courts are best served by employing whichever standard evaluates the competing interests most accurately. Here, courts should abandon deference and turn to empirical study because only then will courts have a better understanding of sobriety checkpoint reasonableness.

